92-158

No. ____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

TOWN SOUND AND CUSTOM TOPS, INC., SUBURBAN AUTO SOUND & COMMUNICATIONS, INC., NORTHEAST ELECTRONICS, INC., and DOMINION RADIO SUPPLY, INC., on behalf of themselves and all others similarly situated,

Petitioners,

v.

CHRYSLER MOTORS CORPORATION,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a rule of reason tying claim under Section 1 of the Sherman Act may be dismissed on summary judgment for failure to "set forth a viable theory of causation of antitrust injury" notwithstanding substantial evidence that an acknowledged tying arrangement (between Chrysler automobiles and autosound equipment suitable for installation therein) has forced consumers to purchase inferior tied products, has concealed from consumers the cost to them of the tied products, has foreclosed a substantial amount of commerce in the tied products, has injured plaintiffs' businesses, and threatens obliteration of a technologically innovative aftermarket in the tied products.

2. Whether a tying claim under Section 3 of the Clayton Act may be dismissed on summary judgment, notwithstanding the evidence described in the preceding question, on the ground that "the effect of [the acknowledged tying arrangement] is not and will not be to 'substantially lessen competition or tend to create a monopoly' in the autosound market."

3. Whether a *per se* tying claim under Section 1 of the Sherman Act may be dismissed on summary judgment for failure to prove market power within a relevant market, on the theoretical ground that Chrysler automobiles cannot possibly constitute a relevant market for tying purposes, notwithstanding substantial evidence that consumers typically decide upon a make of automobile before selecting autosound equipment, that consumers do not typically compare the autosound offerings of competing automobile manufacturers, and that autosound equipment is a small and inexpensive component of the purchase, the price of which is concealed from consumers.

PARTIES TO THE PROCEEDINGS IN THE COURT OF APPEALS

All parties in the Court of Appeals are listed in the caption of the case in this Court. Petitioners have no publicly-held parent companies, subsidiaries or affiliates.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners petition for a writ of certiorari to review the judgment of the *en banc* United States Court of Appeals for the Third Circuit, issued on March 26, 1992, which granted summary judgment to Chrysler Motors Corporation in this tying case brought under the federal antitrust laws.

OPINIONS BELOW

The opinion of the Court of Appeals *en banc* is reported at 959 F.2d 468 and is set out at App. 1a. An opinion of the prior panel is reported at 1991-92 TRADE REGULATION REPORTS (CCH) ¶ 69,527 and is set out at App. 72a.

The decision of the district court appears at 743 F. Supp. 353 and is set out at App. 94a.

JURISDICTION

The Court has jurisdiction under 28 U.S.C. § 1254(1). The judgment was made and entered on March 26, 1992. On June 3, 1992, Associate Justice David H. Souter granted petitioners an extension through and including July 24, 1992 to file this petition for a writ of certiorari.

The Court of Appeals had jurisdiction under 28 U.S.C. § 1291; the district court had jurisdiction under 15 U.S.C. § 15 and 28 U.S.C. § 1337(a).

STATUTES INVOLVED

In pertinent part, Section 1 of the Sherman Act, 15 U.S.C. § 1, provides that "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . ."

In pertinent part, Section 3 of the Clayton Act, 15 U.S.C. § 14, provides that "[i]t shall be unlawful for any person engaged in commerce . . . to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities . . . on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect . . . may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

STATEMENT OF THE CASE

Chrysler Motors Corporation, like Ford and General Motors, has since at least 1984 required that its franchised dealers and those consumers who wish to purchase Chrysler automobiles also purchase automotive sound

equipment (primarily AM/FM stereo radios and radios with cassette or compact disc players) from Chrysler. 959 F.2d at 471-73. By so doing, Chrysler has eliminated the vigorous competition for the sale of autosound equipment that it once faced from independent manufacturers, distributors and retailers of autosound equipment, and has foreclosed a minimum of 10% of the total market for autosound equipment sold in the United States, representing annual sales of an estimated $20,000,000. 959 F.2d at 499; Complaint ¶ 43.*

Automobiles and automotive sound equipment have historically been separate products with separate demand. By the mid-1970's independent manufacturers, importers, distributors and retailers of such sound equipment ("the autosound aftermarket") accounted for approximately 25% of the sales of automotive sound equipment installed in new automobiles, including Chrysler automobiles. Complaint ¶ 18.

Although it had previously sold car radios as items priced separately from its automobiles, Chrysler by the mid-1980's began to include factory installed sound systems as a standard feature in its cars. 959 F.2d at 472-73. Today the price of a sound system is included, and hidden, in the base price of virtually all Chrysler automobiles. Complaint ¶ 33; 959 F.2d at 473. Whereas car buyers could formerly purchase Chrysler cars without sound systems and buy their own systems from independent autosound dealers, or could choose to purchase no sound system at all, now they cannot even receive partial credit on the price of a Chrysler car for deleting the sound system, unless they upgrade to another Chrysler sound system. *Id.* Plaintiffs, like other independent autosound

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* Because Chrysler's summary judgment motion was bottomed exclusively on its purported lack of market power, measured by market share, the allegations of the Complaint were never challenged on summary judgment and plaintiffs had no reason to present other evidence on such points.

dealers, have consequently seen a drastic drop off of sales of their products and services. 959 F.2d at 471-73. Declining market potential has forced some competitors to go out of business (Deposition of Z. Sandor Mlinko) and others to branch into different product lines (Deposition of Randall Ewers), and has generally threatened the destruction of the technologically innovative autosound aftermarket. 959 F.2d at 498.

At the very time Chrysler's tie-ins were first imposed, as well as thereafter, the autosound aftermarket in many instances offered both dealers and consumers higher quality, lower cost products, greater choice and a better warranty than Chrysler products. Complaint ¶ 19. Indeed, prior to the mandated tie-in, use of aftermarket products frequently enabled Chrysler dealers to achieve greater profits and as a result many Chrysler dealers purchased substantial quantities of aftermarket sound systems. (Radio Deletion/Substitution Survey, January 11, 1984.)

Two goals of Chrysler's tie-ins have been maximizing corporate profits and obstructing aftermarket competition. (Memorandum of J.D. Withrow, February 1, 1984; Strategic Marketing Plan, Radio Program Overview, April, 1985.) Chrysler has recognized that parallel practices of Ford and GM also have effectively blocked the sales of aftermarket competitors. 959 F.2d at 501.

Many of Chrysler's franchised dealers as well as representatives of Chrysler's management have admitted that before and after the tie-ins Chrysler's autosound products were poor and uncompetitively priced. Chrysler dealers have at meetings of Chrysler's "Dealer Council" complained of Chrysler radios' high cost and low quality, and of the superiority of aftermarket radios. 959 F.2d at 502. Just before the tie-ins, Chrysler admitted that it had price and quality barriers to remove before it could get buyers to demand its original equipment sound systems. (Memorandum of Options and Mix Merchandising Specialist, August 10, 1983.) Shortly thereafter, a survey

of Chrysler dealers disclosed that 52% would order more Chrysler radios if they were price competitive. (Radio Deletion/Substitution Survey, January 11, 1984.) A survey of consumers who had had aftermarket radios installed disclosed that 40% had done so on price-value considerations. (Audio Equipment Survey, February 3, 1984.) Chrysler's upgraded installation rates fell short of Chrysler's goals because of Chrysler's "extremely poor radio offerings." (Research On Desired Options, March 19, 1986.) Chrysler subsequently through its tie-ins has been able to force dealers and consumers to purchase its radios on over 95% of the automobiles Chrysler manufactured, despite these serious pricing and quality disadvantages. 959 F.2d at 472-73.

Plaintiffs in this action are four businesses which distribute and install automotive sound equipment. They brought this action as a class action in 1988, seeking injunctive relief and damages against Chrysler's tie-ins under both the *per se* and rule of reason standards of Sherman Act Section 1 and under Clayton Act Section 3. Before discovery had proceeded past the document stage, Chrysler moved for summary judgment. For purposes of the motion, Chrysler did not dispute that a tie-in of separate products was involved or that the tie-in foreclosed a substantial amount of interstate commerce. Chrysler merely contended that as a result of its possession of under 15% market share in the U.S. automobile market and the market for all autosound equipment and its purported lack of power over the price of automobiles sold in the United States, plaintiffs could not prove that Chrysler had sufficient "market power" to violate either the Sherman Act or the Clayton Act. Chrysler did not then contend or offer any factual support for a proposition that plaintiffs had not shown antitrust injury. Chrysler supported its motion with various conclusory affidavits, resting in economic theory, that focused upon Chrysler's purported lack of power over price in the market for all automobiles and

the proposition that consumers typically compare several automobiles before purchasing one and therefore could not be forced to buy Chrysler radios. Chrysler's expert admitted that market power includes the power profitably to sustain an output or quality reduction that injures consumers. (Affidavit of Franklin Fisher, ¶ 7.)

Plaintiffs in response offered an array of evidence that Chrysler, notwithstanding its comparatively modest market share in the United States automotive market as a whole, had the special ability to force consumers to purchase autosound products that the purchasers might have purchased elsewhere on different terms, or not at all, by virtue of the desirability of its automobiles to some of these customers the characteristic impatience of Chrysler buyers (Booz-Allen Survey—Improved Order Stability), and other factors unique to the purchase of automobiles. Plaintiffs submitted a consumer survey which showed that consumers typically first decide upon a make of automobile and do not even address the choice of autosound equipment, a comparatively small and relatively inexpensive component of the purchase, until after they have already selected such automobile, which they normally purchase from dealer inventories. Plaintiffs further offered evidence from Chrysler dealers that it is rare for their customers to compare the autosound offerings of competing manufacturers; one large volume dealer in Detroit testified that he never had the understanding that his customers compared Chrysler radios to Ford or GM radios. (Deposition of Arthur Roshak.) Chrysler's national sales manager admitted that radio issues would not break a deal for automobiles unless the price or quality of Chrysler radios was "outlandish." (Deposition of Edward Thomas Pappert.)

Plaintiffs in opposing summary judgment contended that evidence of Chrysler's actual ability to force consumers to purchase autosound offerings that they might have preferred to purchase elsewhere, as well as the actual man-

ner by which Chrysler's radios were purchased, showed disputed facts concerning market power and market definition that precluded summary judgment for both *per se* and rule of reason purposes. Plaintiffs further contended that the relevant markets in which to examine Chrysler's economic power were the markets for Chrysler automobiles and for autosound systems for inclusion in Chrysler automobiles. Moreover, plaintiffs asserted that even if broader market definitions were applicable, ample evidence of forcing precluded summary judgment on their rule of reason claim regardless of Chrysler's market share in the automobile market. Plaintiffs also argued that under Section 3 of the Clayton Act, market power was not a required element of proof.

Under the trial court's schedule, discovery proceeded while Chrysler's summary judgment motion was pending, but expert witness discovery was not to be conducted until the close of fact discovery. Shortly before expert discovery began, the trial court vacated the listing of the case for trial by jury and the expert discovery provisions of its case management order, pending a ruling on the summary judgment motion. On July 2, 1990, without ever having heard argument or evidence, including testimony from the experts for either of the parties (and indeed in disregard of opinion evidence from plaintiffs' expert supporting plaintiffs' claims), the court granted Chrysler's summary judgment motion and entered judgment for Chrysler, finding that Chrysler by reason of its market share in the total U.S. automotive market conclusively lacked sufficient market power to establish a *per se* Section 1 violation, and concluding that Chrysler's lack of a dominant market share in that market or in the entire autosound market was fatal to plaintiffs' rule of reason and Clayton Act claims.

On August 9, 1991, a panel of the Third Circuit upheld the grant of summary judgment as to plaintiffs' *per se* theory but reversed and remanded the case for trial on

plaintiffs' rule of reason and Clayton Act claims, holding that proof of market power was not an essential prerequisite to these claims. Chrysler sought rehearing *en banc* on the grounds that purported conclusions of the panel with respect to an asserted lack of market power by Chrysler were fatal to all of plaintiffs' claims. After granting such rehearing, the *en banc* Court held that Chrysler's market power for purposes of plaintiffs' *per se* claims was to be measured by market share and power over price in the automobile market as a whole. The *en banc* Court agreed with the panel that the absence of market power resulting from that measurement was not fatal to plaintiffs' rule of reason and Clayton Act claims. It found, however, that plaintiffs had offered no plausible theory of injury cognizable under the antitrust laws and affirmed the initial grant of summary judgment.

REASONS FOR GRANTING THE WRIT

In upholding summary judgment for defendant on the grounds that the record did not show antitrust injury cognizable under the Sherman Act or the Clayton Act, the *en banc* Third Circuit decided important and recurring questions of antitrust law and of tying law under the rule of reason.

The Third Circuit's decision is in direct and apparent conflict with decisions of this Court. This Court in its June 8, 1992 decision in *Eastman Kodak Co. v. Image Technical Services, Inc.* ("*Kodak*"), 60 U.S.L.W. 4465, 4469, held that summary judgment against even a *per se* tying claim could not be justified by "legal presumptions that rest on formal distinctions rather than actual market realities." The decision below committed the same error of reliance upon irrelevant competition in another market to excuse anticompetitive conduct and thus is in direct and apparent conflict with *Kodak*. Having preserved *per se* tying law in *Kodak*, this Court should use the present case as the vehicle for protection of rule

of reason tying law from emasculation by similar theoretical notions of economic "implausibility."

This case raises important issues as to the meaning of injury to competition under *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1976), and a serious misconstruction of the meaning of *Brunswick*. The case also involves misconstruction of another leading precedent of this Court, *Times-Picayune Publishing Co. v. United States*, 354 U.S. 594 (1953), which declared substantial market foreclosure, standing alone, sufficient to prove a tying violation under the Clayton Act. That declaration of *Times-Picayune* has stood as the law of this Court for nearly forty years.

While misconstruing important precedents of the Supreme Court, the *en banc* Third Circuit self-consciously attempted to provide guidance to other federal courts for future rule of reason claims. It apparently concluded that rule of reason claims would dominate tying cases in the future because of its expectation that this Court would retreat from or narrowly limit *per se* cases, and it found the case law relevant to rule of reason claims "amazingly sparse." 959 F.2d at 482. In the course of opining broadly on the elements of rule of reason claims, the Court of Appeals correctly rejected what it perceived to be the view of some other circuits that market power is an element of a rule of reason tying violation, but then went on to impose an antitrust injury standard on rule of reason cases, without precedent in the decisions of this Court, that would be virtually impossible to meet.

In so doing, the Court of Appeals ventured extensive views upon an issue with little precedent—the circumstances under which consumers would be injured by tying arrangements—not on the basis of a factually intense trial record that showed how cars and car radios were actually purchased and what the actual effects were of Chrysler's tie-ins, but rather on the basis of alleged economic theory about the nature and effect of competi-

tion in the automobile industry, ignoring the actual oligopolistic characteristics of that market, in direct and apparent contravention of principles enunciated by this Court in *Kodak*. As set forth below, the Third Circuit's conclusion that consumers were not injured by the tie-ins in this case also was in direct conflict with the Court's decision in *Kodak*.

I. THE COURT OF APPEALS' "ANTITRUST INJURY" ANALYSIS WOULD EMASCULATE RULE OF REASON TYING LAW IN A MANNER THAT IS CONTRARY TO BOTH THE SPIRIT AND THE LETTER OF THIS COURT'S RECENT *KODAK* DECISION AND PRIOR DECISIONS OF THIS COURT

Although the Third Circuit recognized that plaintiffs had shown evidence of harm to themselves and to consumers resulting from Chrysler's tie-ins, 959 F.2d at 472, it concluded that neither harm was cognizable under the antitrust laws because plaintiffs had not presented a "plausible theory of antitrust harm that does not depend implicitly on power leveraging." *Id.* at 486. The Court of Appeals misconstrued *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2 (1984) ("*Jefferson Parish*"), as signalling that this Court's overriding concern in tying cases was in the application of market leverage by firms with dominant market shares. It concluded that although past cases had spoken of the evils of foreclosure of consumer choice, "[m]ore recent Supreme Court cases have primarily concerned themselves with that danger when a seller leverages economic power from one market to another." 959 F.2d at 476. Consequently, the Court of Appeals held that the facts (1) that consumers were required by Chrysler's tie-ins to accept autosound equipment of inferior quality, (2) that the tie-ins created or exploited market imperfections and made it impossible for even "nonlazy" consumers to know the price for the autosound equipment, and (3) that the tie-ins foreclosed a substantial portion of the autosound market with the

result that plaintiffs had lost sales and that a once thriving and technologically innovative autosound aftermarket was being destroyed, did not evidence a "plausible" theory of antitrust injury in a rule of reason case. *Id.* at 487-95.

Because the antitrust injury issue had not been raised by Chrysler's summary judgment motion, the Third Circuit speculated as to plaintiffs' theories of antitrust injury and rejected each potential allegation of harm. It held that the "competitive oblivion" of the autosound aftermarket would be "no concern of the antitrust laws" unless "consumers were also hurt because of diminished competition." *Id.* at 495 n.40. It concluded that consumers could not be injured, on the speculative theory that competition among automobile manufacturers would necessarily provide incentives to manufacturers to improve autosound products and would protect consumers from having to pay inflated prices for autosound systems. *Id.* at 488, 495. The Court of Appeals also concluded that the market imperfections caused or exploited by Chrysler's tie-ins raised consumer information concerns, but not the kind of antitrust injury that was a concern of the antitrust laws, and seemingly found that antitrust injury cannot exist by virtue of the fact that consumers are unable or unwilling to determine the separate costs of two components of a tie-in. *Id.* at 489-93. It therefore refused to allow plaintiffs' rule of reason tying claim to be heard by a jury.

Whether plaintiffs had presented a plausible theory of antitrust injury is an important question of federal law which should be settled by this Court. Moreover, the Court of Appeals' decision is in direct and apparent conflict with the applicable decisions of this Court.

To begin with, both *Jefferson Parish*, 466 U.S. at 17-18, and *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495 (1969) ("*Fortner I*"), make clear that in the absence of *per se* liability, a sales arrangement which otherwise qualifies as a tying arrangement and

forecloses a substantial amount of commerce may be evaluated under the rule of reason without other threshold requirements. Indeed, in *Fortner I*, the Court found it unnecessary to address in detail the plaintiff's rule of reason theory in light of the extent of market foreclosure involved. The Court in *Fortner I* noted that it had stated in *International Salt Co. v. United States*, 332 U.S. 392, 396 (1947), that it is " 'unreasonable, per se, to foreclose competitors from any substantial market' by a tying arrangement . . . ." 394 U.S. at 501.

The holding of the Court of Appeals—that the threatened obliteration of the technologically innovative autosound aftermarket and the foreclosure of sales into a multi-million dollar market resulting from a tie-in which mandates purchase of an overpriced, inferior tied product cannot cause antitrust injury—is also in direct and apparent conflict with *Kodak*. There, this Court held, "[t]he alleged conduct—higher service prices and market foreclosure—is facially anticompetitive and *exactly the harm that antitrust laws aim to prevent*." 60 U.S.L.W. at 4472 (emphasis added).

The *Kodak* decision makes clear, in its analysis of the Section 2 claims presented therein, that competition in ancillary markets, such as autosound equipment for inclusion in Chrysler automobiles, is important and deserving of the protection of the antitrust laws. Furthermore, the Court in *Kodak*, over the vigorous dissent of Mr. Justice Scalia, who twice cited to the Third Circuit's decision in this case as supporting his dissenting views, held that market imperfections like those at issue in this case are a concern of the antitrust laws because they prevent purchases being made on the basis of accurate information and may make an otherwise untenable claim of market power not unreasonable. 60 U.S.L.W. at 4471-72. Under the holding in *Kodak*, even those consumers who are able to, but choose not to, conduct the investigation necessary to inform themselves as to the component costs of a tied package are entitled to antitrust law protections. *Id.* at 4471.

The Third Circuit's belief that competition in automobiles necessarily protects competition in ancillary markets, such as the autosound market, was squarely rejected in *Kodak*, where the Court held that competition in a primary market did not necessarily prevent exploitation of aftermarkets. More generally, the *Kodak* decision directly rejected the reliance on sterile economic theory underlying the decision of the Court of Appeals, and mandated an intensive factual inquiry into actual market conditions. Such an inquiry in this case would have included an examination of the cumulative economic effects of all domestic auto manufacturers tying autosound equipment to their cars, which may affect 50-75% of new car sales. 959 F.2d at 499. Such an inquiry—which would have precluded summary judgment in this case—was particularly necessary because this case presented a rule of reason claim under Section 1 of the Sherman Act.

The Court of Appeals' "no antitrust injury" theory also significantly misconstrues *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. at 488, and *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104 (1986). In those cases, the conduct complained of enhanced, rather than diminished, competition. The diminished competition resulting from Chrysler's tie-ins patently represents an injury to competition. This Court has shown strong concern for the interests of competing suppliers of a tied product in free access to the consumer market, and a strong desire that competition and the sale of each product should be on its merits. *See* D. Turner, *The Validity of Tying Arrangements Under the Antitrust Laws*, 72 HARV.L.REV. 50, 60-61 (1958). The harm to competition from preventing other sellers of the tied product from selling to the tied buyers in fact has been relied upon or referred to in all tie-in cases since *International Business Machines Corp. v. United States*, 298 U.S. 131 (1936). *See* W. David Slawson, *Excluding Competition Without*

Monopoly Power: The Use Of Tying Arrangements To Exploit Market Failure, THE ANTITRUST BULLETIN 457, 481, 487-88 (Summer 1991).

Moreover, well-established principles of antitrust law recognize that competition is injured by tie-ins because they reduce buyers' alternatives both by raising barriers to entry and by driving sellers who do not offer both products from the market. Slawson, *supra* at 491; W. David Slawson, *A Stronger, Simpler Tie-In Doctrine*, THE ANTITRUST BULLETIN 671, 676 (Winter 1980).

In this case, because there were substantial disputed issues as to the extent of Chrysler's economic power and the relevant markets, and ample evidence of injury of the type condemned by the antitrust laws, the refusal of the Third Circuit to permit plaintiffs' rule of reason claim to proceed to trial represents a serious misconstruction of the federal antitrust laws and conflicts with important precedents of this Court.

II. THE APPLICABILITY OF SECTION 3 OF THE CLAYTON ACT TO TYING ARRANGEMENTS FORECLOSING A SUBSTANTIAL AMOUNT OF COMMERCE, AS ACKNOWLEDGED HERE, IS AN IMPORTANT QUESTION THAT SHOULD BE SETTLED BY THIS COURT

The Court of Appeals concluded that the plaintiffs could not establish a Clayton Act claim for the same reason it dismissed plaintiffs' Sherman Act claims. It held that Chrysler's tie-ins could not substantially lessen competition, and were not causing or likely in the future to cause antitrust injury. The Court of Appeals apparently accepted *arguendo*, but expressed doubt upon the merits of, plaintiffs' argument that under *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594 (1953), market power was not a necessary element of a Clayton Act tying claim.

The question of whether competitive injury of the type presented on this record was cognizable under Section 3 of the Clayton Act, which condemns tie-ins where their effect "may be to substantially lessen competition," is an important and recurring issue under the Clayton Act that should be settled by this Court. Moreover, the holding of the Third Circuit that restraint of a not insubstantial amount of commerce is insufficient proof of a Section 3 tying claim is in direct and apparent conflict with this Court's decision in *Times-Picayune* and its antecedents.

In *Times-Picayune*, 345 U.S. at 608-09, the Court synthesized prior law when it declared that whenever a seller enjoys a dominant position in the market for the tying product *or* ties up a substantial amount of commerce, the tying arrangement violates the standards of Section 3 of the Clayton Act because from *either factor* the requisite *potential* lessening of competition may be inferred. Such pronouncement, which has stood as the last word of the Court on the subject for nearly forty years, was hardly casual dictum. Moreover, *Times-Picayune* has been cited approvingly by the Court in *Fortner I*, 394 U.S. at 499, in *Jefferson Parish*, 466 U.S. at 10 n. 14, 13, 18, 19, and in *Kodak*, 60 U.S.L.W. at 4469, 4473, without any indication that its holding as to the standards for Section 3 violations was in any way suspect or outmoded.

The question of the proper interpretation of the elements of a Section 3 violation is a particularly important one to be settled by this Court. The contrast between the Sherman Act and Clayton Act is of vast historical significance. The Clayton Act was enacted as a response to judicial glosses on the Sherman Act, including the Court's employment of the rule of reason standard in Section 1 cases involving practices alleged actually to restrain trade. The Clayton Act's express condemnation of arrangements the effect of which "*may be* to substantially lessen competition or tend to create a monopoly" (em-

phasis added) from the outset clearly set "a more rigorous legal norm, a low threshold of tolerance for conduct which may restrain, which gives the Clayton Act its special significance." L.A. SULLIVAN, HORNBOOK OF THE LAW OF ANTITRUST (1977 ed.), at 432. As Professor Sullivan has noted, "[a]s the legislative history suggests and as the Court has often held," the above-quoted words "show an intent to arrest *in its incipiency conduct which eventually might develop into a violation of* Section 1 or 2 of Sherman." *Id.* (emphasis added). Congressional debate on the Clayton Act reflected a shared presumption by the legislators that Clayton Act prohibitions would be stricter than Sherman Act prohibitions. *See, e.g.*, 51 Cong. Rec. 14267 & 16147 (1914). In *Standard Oil Co. v. United States*, 337 U.S. 293, 297 (1949), the Court thus declared that applying rule of reason standards similar to those enumerated in *Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918), would "stultify the force of Congress' declaration" in Section 3 that certain "contracts are to be prohibited wherever their effect '*may be*' to substantially lessen competition." 337 U.S. at 313 (emphasis added).

The decision of the Court of Appeals that plaintiffs had not offered a cognizable claim under Section 3 is in sharp conflict with *Times-Picayune* and its antecedents. As they make clear, the mere tying up of substantial sales gives rise to a potential lessening of competition, wholly apart from the other demonstrably anticompetitive consequences of tie-ins such as Chrysler's. The Third Circuit's upholding of the dismissal of plaintiffs' Clayton Act claim was thus premised upon a serious misconstruction of, and conflicts with, important and indeed historic precedents of this Court.

III. THE GRANT OF SUMMARY JUDGMENT ON PLAINTIFFS' *PER SE* TYING CLAIM IS CONTRARY TO THE *KODAK* DECISION IN LIGHT OF EVIDENCE OF FORCING IN A SINGLE-PRODUCT MARKET

The direct evidence of forcing in this case and the evidence of a relevant single-product market also rendered the Third Circuit's upholding of summary judgment in direct and apparent conflict with this Court's decision in *Kodak*. Summary judgment in this case clearly rested on assumptions grounded in putative economic theory about the nature and consequences of competition in the automobile market. The foundation for these theoretical assumptions was a conclusory, pre-discovery affidavit of Chrysler's expert, who at no time analyzed the actual process by which cars and car radios are purchased, or even took into account the consequences of the oligopolistic characteristics of the domestic automotive industry as outlined by Chief Judge Sloviter in a forceful dissenting opinion. 959 F.2d at 501-02. The Third Circuit apparently disregarded or discounted appellants' consumer survey evidence about the manner in which cars and car radios are actually purchased, facts which show the inelasticity of demand for car radios. *See* 959 F.2d at 502 (Sloviter, C.J., dissenting).

In *Kodak*, however, this Court made clear that legalistic presumptions that rest on formalistic distinctions and economic theories, rather than actual market realities, are to be disfavored, especially in the context of summary judgment motions in antitrust cases. 60 U.S.L.W. at 4469. The Third Circuit did not look at the economic realities in this case to determine whether forcing was present. To the contrary, it erroneously concluded that *Jefferson Parish* had instructed it to look at market power determined solely "by examining market structure" and power over price to see whether courts should presume economic harm. It rejected plaintiffs' contentions that

Jefferson Parish had broadly defined market power as a "special ability to force a purchaser to do something that he would not in a competitive market" and the Court of Appeals opined that direct inquiry into forcing as a barometer of market power was precisely "what the *per se* analysis is supposed to obviate." 959 F.2d at 478-79. The Third Circuit predicted that this Court would rule that to obtain summary judgment a defendant need only demonstrate that a plaintiff has failed to make any showing that the defendant has power in an "economically and legally relevant" tying product market. *Id.* at 479 & n.12.

The Court rejected plaintiffs' contentions that a jury might reasonably conclude that, in light of the real world behavior of Chrysler and autosound consumers, the relevant tying product market was the market for Chrysler automobiles; that the relevant tied product market was the market for autosound equipment for Chrysler vehicles; and that Chrysler possessed economic power in those markets or, in any event, sufficient power to force the tie-in so as to bring it within the condemnation of the antitrust laws. The Court concluded that those arguments made "no sense in terms of real world economics," and that as a matter of law it could not adopt them. The Third Circuit seemingly found that *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), supported its disposition of this case.

In direct contrast to and conflict with the decision of the Court of Appeals, the decision in *Kodak* made clear that *Matsushita* did not introduce any special summary judgment burden on plaintiffs in antitrust cases. 60 U.S.L.W. at 4470. The Court in *Kodak* also made clear that *Matsushita* had *not* held that if a moving party enunciates any theory supporting its behavior it is entitled to a summary judgment, but rather that an antitrust defendant bears a substantial burden. *Id. Kodak* held that where there is evidence of increased prices and excluded competition, an antitrust defendant must come

forward with facts demonstrating that an inference of market power is unreasonable. *Id.* at 4472. Moreover, under the *Kodak* decision, as a result of the type of market imperfections present in this case, sufficient economic power to render a tie-in unlawful might exist even in the absence of the type of dominant market share and power over price which had seemed to concern the Court in *Jefferson Parish. Id.*

In the context of the Section 2 claim presented therein, the Court in *Kodak*—invoking *United States v. E. I. duPont de Nemours & Co.*, 351 U.S. 377 (1956)—emphasized that one brand of product can often constitute a separate market for antitrust purposes and that proper market definition can be determined only after factfindings to consider the realities faced by consumers and the extent to which one product is a substitute for another. The *Kodak* decision favorably cited *Heatransfer Corp. v. Volkswagenwerk A.G.*, 553 F.2d 964 (5th Cir. 1977), *cert. denied*, 434 U.S. 1087 (1978), which concluded that for antitrust purposes, air conditioners for Volkswagens could constitute a relevant market, as well as *International Logistics Group, Ltd. v. Chrysler Corp.*, 884 F.2d 904, 905, 908 (6th Cir. 1989), *cert. denied*, 494 U.S. 1066 (1990), which held that parts for Chrysler cars were a relevant market. 60 U.S.L.W. at 4473-74 & n.31. These citations contrasted sharply with the Third Circuit's observations that "[e]xcept in rare circumstances courts reject" single brand market definitions, and that "[p]roposed Chrysler-only product market definitions" had been rejected by the courts. 959 F.2d at 480.

Under the *Kodak* decision, plaintiffs' claims of market definition and market power were sufficiently reasonable to preclude a summary disposition of their *per se* tying claims, and the Third Circuit's contrary conclusion misconstrued and conflicts with important precedents of this Court on that issue.

CONCLUSION

For all the reasons stated above, the writ of certiorari should be granted.

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Dated: July 24, 1992

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
THIRD CIRCUIT

No. 90-1547

TOWN SOUND AND CUSTOM TOPS, INC., SUBURBAN AUTO SOUND & COMMUNICATIONS, INC., NORTHEAST ELECTRONICS SUPPLY, INC., DOMINION RADIO SUPPLY, INC., on behalf of themselves and all others similarly situated,
Appellants,

v.

CHRYSLER MOTORS CORPORATION

Argued Dec. 14, 1990

Reargued Nov. 13, 1991

Decided March 26, 1992

Donald B. Lewis (argued), Ann Miller, Law Offices of Donald B. Lewis, Philadelphia, Pa., Sidney Dickstein, Peter J. Kadzik, Dickstein, Shapiro & Morin, Washington, D.C., for appellants.

Joseph Angland (argued), Robin D. Adelstein, Steven A. Klein, Dewey Ballantine, New York City, Lewis H. Goldfarb, Allan M. Huss, Paul R. Eichbauer, Chrysler Corp., Highland Park, Mich., for appellee.

Argued Dec. 14, 1990

Before SLOVITER, Chief Judge,* MANSMANN, Circuit Judge, and SAROKIN, District Judge**.

Reargued Nov. 13, 1991

Before SLOVITER, Chief Judge, and BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, and ROTH, Circuit Judges.

OPINION OF THE COURT

BECKER, Circuit Judge.

Until the mid-1970s, Chrysler Motors Corporation ("Chrysler") and other leading American automobile manufacturers sold car radios as options that were priced separately from the rest of the cars' standard features. By the mid-1980's, however, Chrysler began to include factory-installed sound systems as a standard feature of its models. Today the price of a sound system is included in the base price of virtually all Chryslers, Plymouths, and Dodges ("Chrysler cars"). Whereas car buyers could formerly purchase Chrysler cars without sound systems and buy their own systems from independent autosound dealers, now they cannot even receive credit on a car's price for deleting the sound system. The independent autosound dealers have accordingly seen consumer demand for their products and services decline.

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* The Honorable Dolores K. Sloviter became Chief Judge on February 1, 1991.

** The Honorable H. Lee Sarokin, United States District Judge for the District of New Jersey, sitting by designation.

As a result, the plaintiffs, a group of independent autosound dealers, sued Chrysler in the district court for the Eastern District of Pennsylvania, claiming that Chrysler has illegally restrained commerce by conditioning the sale of Chrysler cars on the purchase of Chrysler-supplied autosound systems. Their complaint avers that Chrysler's actions force purchasers of Chrysler cars to accept inferior and overpriced Chrysler-supplied sound systems, resulting in harm to consumers as well as to the independent dealers themselves. Specifically, the plaintiffs claim that Chrysler has tied the sales of Chrysler cars and automobile sound systems for Chrysler cars in violation of section 1 of the Sherman Act, 15 U.S.C. § 1 (1988), and section 3 of the Clayton Act, 15 U.S.C. § 14 (1988). They seek certification as class representatives and, eventually, treble damages, injunctive relief, costs, and attorneys' fees.

Upon consideration of Chrysler's motion for summary judgment, the district court ruled that because Chrysler lacked market power in both the tying product market (all automobiles sold domestically) and the tied product market (all autosound systems sold domestically), the plaintiffs could not succeed under either "per se" or rule of reason theories of antitrust liability. It accordingly denied the plaintiffs' request for class certification and entered a final judgment for Chrysler. On appeal, a panel of this court unanimously affirmed the district court's ruling on the "per se" theory but reversed on the rule of reason theory. Chrysler sought and obtained an order granting rehearing in banc, which vacated the panel opinion.

We agree with the district court that Chrysler possesses insufficient tying market power to violate the Sherman Act on a "per se" theory. We also believe that in some cases a tying claim based on the rule of reason may survive summary judgment when the seller lacks power in the tying product market. We nevertheless hold that these

plaintiffs' allegations, when combined with indisputable evidence of market structure, are insufficient to withstand Chrysler's motion for summary judgment. Although the plaintiffs have proffered some evidence of harm to themselves and to consumers from the tie-in, they do not offer any theory of how Chrysler caused them an injury cognizable under the antitrust laws as the Supreme Court's jurisprudence requires. This reasoning applies equally to the plaintiffs' Clayton Act claim. Accordingly, we will affirm the district court's summary judgment for Chrysler in its entirety.

I. FACTS, PROCEDURAL HISTORY, AND THE PARTIES' THEORIES OF THE CASE

From the early days of the automotive industry until the mid-1970s, automobile manufacturers produced and sold virtually all of the sound systems for use in their cars. During that era, each company's car radios were separately priced, add-on options for its new cars. Around the mid-1970s, however, perhaps as a result of the increasing sophistication of stereophonic equipment and of consumer tastes, independent companies began to manufacture, distribute, and sell various autosound products including AM and FM car radios, cassette decks, and, eventually, compact disc systems. Some of these independently produced sound systems were sold to auto manufacturers which installed them at the factory; others were sold and installed in a vigorous "aftermarket," either directly to the retail public or indirectly through local car dealerships.

The plaintiffs seek to be representatives of a class of independent (non-Chrysler franchisee) autosound dealers who have competed since 1984 with Chrysler in the sale of automotive sound equipment for installation into Chrysler cars sold in the United States. All four of the named plaintiffs distribute autosound equipment to and install that equipment for local automobile dealerships; three also

sell autosound systems directly to the public. Chrysler is the third largest American manufacturer of automobiles, accounting for between 10 and 12 percent of the total American market for cars between 1983 and 1987 (the market consisting of domestic sales of cars of either foreign or domestic manufacture). Chrysler both manufactures its own autosound equipment and purchases autosound equipment from the independent manufacturers, which also supply the plaintiffs.

The parties agree on the basic facts about Chrysler's autosound sales practices. Until the mid- to late 1970s, Chrysler customers could purchase cars with or without sound systems. They could easily purchase a Chrysler car with a factory-installed sound system (of either Chrysler or independent manufacture), or with no sound system at all. If they chose a Chrysler car without a sound system, they would not be charged for one and therefore could purchase a different sound system on the retail aftermarket with no financial penalty.

By 1978, however, Chrysler, along with other auto manufacturers, began to standardize autosound equipment—that is, it included what had been a separately priced sound system option into the base price of the vehicle. When a feature is standard, no credit for deleting it is permitted. The 1979 settlement of litigation brought by aftermarket autosound dealers against other automobile manufacturers resulted in Chrysler's agreement that it would either make autosound systems entirely optional or offer a "delete option" for sound systems on many of its models.[1] The delete option, however, by its nature had no effect on those buyers who were unaware of it, or on the sizeable percentage of less patient buyers who preferred

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[1] By exercising the delete option, which was in effect for model years 1980 to 1983, Chrysler buyers could specially order cars from the factory without a factory-installed sound system, and if they did so they would receive a credit against the base price of the car.

to purchase out of dealer inventories than to special-order their cars.

Chrysler's arrangement with aftermarket representatives expired in 1983, and, starting with the 1984 model year, it steadily began to eliminate the sound system delete option on virtually all of its models and to upgrade the standard sound equipment on many models. According to the plaintiffs, by 1986, 95.9 percent of Chrysler cars were delivered to dealers with factory-installed sound systems, in comparison to 88.5 percent in 1979 (before the agreement with the aftermarket) and 67.2 percent in 1981 (during the agreement). Under Chrysler's revised sound system sales practices, dealers do not receive a credit for sound systems that they remove unless the customer upgrades to another sound system supplied by Chrysler. As a result, although a Chrysler buyer may still remove the factory-installed sound system and purchase a different one on the aftermarket, he or she will then have paid for two sound systems.

In this suit, filed on January 7, 1988, the plaintiffs challenge Chrysler's autosound sales practices dating from January 1, 1984 as a tie-in arrangement that is illegal under the antitrust laws. They allege, in essence, that automobiles and autosound equipment are separate products, and that by tying the two, Chrysler has insulated itself from competition with respect to autosound systems for its cars, thereby depriving consumers of choice and inhibiting technological innovation. In the plaintiffs' view, Chrysler is foisting inferior and overpriced sound systems on the Chrysler-buying public and seriously threatening the viability of its aftermarket competitors. According to the plaintiffs, because the value of the sound system is so small relative to that of the entire car, many consumers do not consider autosound systems at all. Many car buyers decide on the car first and only consider the sound system later, and therefore may tolerate or be ignorant of Chrysler's inferior product. Moreover, the plaintiffs

suggest, buyers who do care about their sound systems are unable to determine how good a deal they are getting because Chrysler's inclusion of the sound system in the base price of the whole car hides the price of the auto-sound system.

In legal terms, the plaintiffs' claims rest on section 1 of the Sherman Act, 15 U.S.C. § 1, which generally outlaws "[e]very contract . . . in restraint of [interstate or international] trade or commerce," and section 3 of the Clayton Act, 15 U.S.C. § 14, which proscribes tying the sale of one good to another "where the effect . . . may be to substantially lessen competition or tend to create a monopoly. . . ."[2] The plaintiffs contend that Chrysler's sales practices are illegal under both "per se" and rule of reason theories of antitrust liability. They seek an injunction, treble damages, costs, and attorneys' fees under sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 and 26.

Chrysler, for purposes of its July 15, 1988 motion for summary judgment, conceded that it has tied the sale of new Chrysler cars to the purchase of a separate product, Chrysler-installed autosound systems.[3] Chrysler also conceded, again for purposes of this motion, that this tying arrangement affects a substantial amount of interstate

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[2] Technically, section 3 of the Clayton Act is written to cover exclusive dealing contracts (contracts requiring the purchaser not to deal in the goods of a competitor of the seller), but Congress also intended to cover tying arrangements. A requirement that the buyer take another good of the seller means that the buyer may not deal with other sellers for that purchase. *See IBM Corp. v. United States*, 298 U.S. 131, 137-38, 56 S.Ct. 701, 704-05, 80 L.Ed. 1085 (1936).

[3] Chrysler says that if the case were to go to trial, it would argue that autos and autosound systems are not in fact distinct products, but instead part of one package. According to Chrysler, it only conceded this point for summary judgment purposes to avoid unnecessary lengthy discovery about its historical sales practices. In light of our disposition, the one versus two product issue becomes moot.

commerce. It sought summary judgment solely on the ground that plaintiffs could not show harm to competition as a result of its autosound sales practices.

Generally, Chrysler contends that the plaintiffs did not allege and cannot prove that Chrysler has economic power in a properly defined tying product market. That market, it submits, consists of all new automobiles (in contrast to the plaintiffs' proposed market definition, which includes only new Chrysler cars). Chrysler argues that because it lacks the power to influence prices in the automobile market, it cannot exploit any "leverage" arising from that market. Chrysler also contends that it has no power in the tied product market, which it correspondingly defines as all autosound products (as opposed to the plaintiffs' coordinate one-brand definition consisting only of autosound products for Chrysler cars). Therefore, concludes Chrysler, it is economically incapable of causing any significant economic harm in the autosound market, even by a manner other than leveraging.

In doctrinal terms, Chrysler contends that for its tying arrangement to be illegal "per se" under the Sherman Act, as the plaintiffs allege, the Supreme Court case law requires a showing of tying market power. Because the plaintiffs' submissions do not raise a triable issue on that factual question, says Chrysler, it is entitled to summary judgment on that theory. Chrysler also claims that its lack of tying market power is equally fatal to the plaintiffs' rule of reason theory of liability under the Sherman Act, and that in any event, Chrysler's indisputable lack of market in *both* the tying (automobile) and tied (autosound) markets entitles it to summary judgment. Finally, Chrysler argues that the standards for liability under the Sherman and Clayton Acts are identical, hence it is entitled to summary judgment on the Clayton Act claim as well.

The district court agreed with Chrysler and entered summary judgment for Chrysler on all counts. See *Town Sound & Custom Tops, Inc. v. Chrysler Motors Corp.*, 743

F.Supp. 353 (ED Pa 1990). It defined the relevant tying product market to include "all automobile manufacturers which compete with Chrysler for the sale of automobiles in the United States," *id.* at 357, and found that Chrysler lacked economic power in that market, *id.* at 358-59. Because Chrysler lacked tying market power, the district court held that the plaintiffs could not sustain a "per se" claim of tying liability. *Id.* at 359.

The district court then addressed the plaintiffs' rule of reason theory. Consistent with its approach to defining the tying product market (that is, rejecting the concept of a Chrysler-only market), the district court defined the tied product market as "all sound equipment sold in the United States for installation in automobiles." *Id.* at 360. It also concluded that Chrysler was in no position to restrain trade in the tied product market as thus defined, and thus was entitled to summary judgment. *Id.* at 361. As an alternative ground supporting summary judgment, the court held that Chrysler's lack of market power in the automobile market disposed of the rule of reason claim as well as the "per se" claim. *Id.* at 360-61. Finally, it concluded that the plaintiffs could not succeed on a claim under section 3 of the Clayton Act without proof of tying market power. *Id.* at 361-62. The court also denied the plaintiffs' pending motions for class action certification and for compulsion of certain discovery, including production of cost and profit information on Chrysler's autosound sales.

We now exercise plenary review of the district court's summary judgment. If we find a genuine issue of material fact such that a reasonable jury could return a verdict for the plaintiffs, then we must reverse and remand for further proceedings. FRCP 56. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-52, 106 S.Ct. 2505, 2509-12, 91 L.Ed.2d 202 (1986).

II. "PER SE" LIABILITY

We first consider the plaintiffs' claim that Chrysler's practices violate the antitrust laws "per se."

A. *The Nature of a "Per Se" Tying Claim*

Tying is defined as selling one good (the tying product) on the condition that the buyer also purchase another, separate good (the tied product). See, for example, *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 449 (3d Cir. 1977). Courts have traditionally expressed great concerns about the possible anticompetitive effects of tying arrangements, at least those in poorly functioning or uncompetitive markets.[1] Their fear has centered on sellers who have market power in one product market and seem intent on exploiting that power in another market. See, for example, *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 611, 73 S.Ct. 872, 881, 97 L.Ed. 1277 (1953) ("[T]he essence of illegality in tying agreements is the wielding of monopolistic leverage; a seller exploits his dominant position in one market to expand his empire into the next."). Even if a seller has obtained a monopoly in the tying product legitimately (as by obtaining a patent), courts have seen the expansion of that power to other product markets as illegitimate and competition-suppressing. See, for ex-

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[1] Tying in competitive markets has long been common for promotional and other legitimate purposes. As the Supreme Court has repeatedly observed, package sales such as flour with sugar normally pose no antitrust concern, because if the seller ties the two products and does not offer a good deal, the customer in a competitive market can go elsewhere. See *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2, 11-12, 104 S.Ct. 1551, 1556-57, 80 L.Ed.2d 2 (1984) ("*Jefferson Parish*"). See also *United States Steel Corp. v. Fortner Enterprises*, 429 U.S. 610, 622, 97 S.Ct. 861, 868, 51 L.Ed.2d 80 (1977) ("*Fortner II*") (using cheap financing to sell expensive housing does not by itself violate the antitrust laws). As we will suggest in Part III, however, economic harm in the tied product market may still be possible, though unlikely, when the tying product market is competitive.

ample, *United States v. Paramount Pictures*, 334 U.S. 131, 156-59, 68 S.Ct. 915, 928-29, 92 L.Ed. 1260 (1948); *International Salt Co. v. United States*, 332 U.S. 392, 395-96, 68 S.Ct. 12, 14-15, 92 L.Ed. 20 (1947).

The cases thus reveal a concern that a monopolist in the tying product market may use that leverage to garner sales in a second market, thereby foreclosing competitors and monopolizing the formerly competitive tied product market too. At least, the courts fear, the arrangement may raise barriers to entry to the tied product market because new entrants would have to sell both tied and tying products to compete. See, for example, *Fortner Enterprises v. United States Steel Corp.*, 394 U.S. 495, 513, 89 S.Ct. 1252, 1263, 22 L.Ed.2d 495 (1969) ("*Fortner I*") (White dissenting). Use of a tie-in may enable a producer with monopoly power to force its full line on customers.[5] *Id.* at 513-14, 89 S.C. at 1263-64. Finally, another fear has been that the second monopoly could impede in-

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[5] Through full line forcing, a seller may homogenize heterogeneous demand and increase profits. For example, a movie distributor might own the exclusive rights to three films, and there might be three television stations wanting to rent the films. Station A expects its viewers to like Film 1 and would pay $5000 for it singly, but Station A doubts that its viewers would like Films 2 and 3, so would pay only $2500 for each singly. Station B thinks that Film 2 is worth $5000 but that the other two are worth only $2500 each. And similarly, Station C values Film 3 at $5000, but the first two at only $2500 each. If the distributor marketed each film individually, the market price would be $2500 each, but if the distributor could require the stations to rent all three together, the package price would be $10,000. No station would be forced to take an undesired package, but the distributor would make a larger profit by bundling.

Demand homogenization can also reduce costs, resulting in savings which will inure in part to consumers' benefit. Most relevant to this case, automobile manufacturers have increasingly standardized or packaged options that were formerly purchased singly. They justify that practice in part because it reduces costs somewhat, but it could also increase automakers' profits in the short term (although not in the long term if the automobile market remains competitive).

novation in the tied product market by reducing competitive pressure in that market.

Tying may also provide a way for a monopolist to hide other activities that are either illegal or disfavored by the law. For example, a monopolist may also use a tie to increase its profits by indirect price discrimination, a practice that the Robinson-Patman Act, 15 U.S.C. § 13 (1988), significantly restricts.[6] Even non-monopolists may seek to evade price or other regulatory controls in the tying product market by hiding the inflated price in the tied product's price. *Fortner I*, 394 U.S. at 513, 89 S.Ct. at 1263 (White dissenting).[7]

Although past cases have also spoken of the evils of foreclosing consumer choice (for example, *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 6, 78 S.Ct. 514, 518, 2 L.Ed.2d 545 (1965); *Times-Picayune*, 345 U.S. at 605, 73 S.Ct. at 878). More recent Supreme Court cases have primarily concerned themselves with that danger when a seller leverages economic power from one market to another. The reason is that if the seller has no control over the tying product market, the customer ordinarily has a realistic option to go elsewhere to buy both

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[6] *IBM Corp. v. United States*, 298 U.S. 131, 56 S.Ct. 701, 80 L.Ed. 1085 (1936), is frequently cited as such an example. In that case, IBM had a monopoly on card counting machines—the forebear of modern computers. By charging a lot for cheap punch cards, IBM was able to vary the price for its system according to how intensively its customers used the machine, even though everyone paid the same low price for the machine. The Robinson-Patman Act does not condemn all price discrimination, of course, and many economists doubt the wisdom of prosecuting price discrimination. But price discrimination remains disfavored by the antitrust laws, which gives monopolists an incentive to effect it surreptitiously through tying.

[7] Similarly, a seller might want to attribute income to one source rather than another in order to evade taxes, although in both the tax- and regulatory-evasion circumstances, it is hard to see the additional *antitrust* implications of the otherwise illegal conduct.

the tying and tied products. As Justice Stevens wrote in the majority opinion in *Jefferson Parish:*

> Our cases have concluded that the essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms. When such "forcing" is present competition on the merits for the tied item is restrained and the Sherman Act is violated.

466 U.S. at 12, 104 S.Ct. at 1558. See also *Fortner I*, 394 U.S. at 512-14, 89 S.Ct. at 1263-64 (White dissenting) (cited approvingly by the *Jefferson Parish* majority, 466 U.S. at 13 n. 19, 104 S.Ct. at 1558 n. 19).

In sum, the Supreme Court's primary concern with tying arrangements has always been the use of tie-ins to abuse power in the tying product market. Accordingly, it has

> condemned tying arrangements when the seller has some special ability—usually called "market power" —to force a purchaser to do something that he would not do in a competitive market. . . . When the seller's power is just used to maximize its return in the tying product market, where presumably the product enjoys some justifiable advantage over its competitors, the competitive ideal of the Sherman Act is not necessarily compromised. But if that power is used to impair competition on the merits in another market, a potentially inferior product may be insulated from competitive pressures.

Jefferson Parish, 466 U.S. at 13-14, 104 S.Ct. at 1558-59 (citations omitted). The Court long ago established a so-called "per se" rule against tying arrangements in cases where it thought exploitation of leverage is "probable," *id.* at 15, 104 S.Ct. at 1559.

The hornbook rule provides that where (1) a defendant seller ties two distinct products; (2) the seller possesses market power in the tying product market; and (3) a substantial amount of interstate commerce is affected, then the defendant's tying practices are automatically illegal without further proof of anticompetitive effect. See, for example, *Northern Pacific*, 356 U.S. at 5, 78 S.Ct. at 517; *Bogosian*, 561 F.2d at 449. For other statements of the "per se" rule, see *Fortner I*, 394 U.S. at 498-99, 89 S.Ct. at 1255-56, and the other cases cited in *Jefferson Parish*, 466 U.S. at 10 n. 14, 104 S.Ct. at 1558 n. 14.

The rule in tying cases is not, however, like other, truly per se rules in antitrust law.[8] For example, naked horizontal price fixing is condemned with no inquiry at all into market structure or the activity's actual effect or possible justifications. The rationale for true per se rules is that the challenged conduct has so little chance of being economically beneficial and so great a likelihood of being economically harmful that inquiry into market structure and real world effect is not worth the cost. See, for example, *Jefferson Parish*, 466 U.S. at 15 n. 25, 104 S.Ct. at 1560 n. 25; *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 350-51, 102 S.Ct. 2466, 2475-76, 73 L.Ed.2d 48 (1982). The "per se" rule against tying goes only halfway, however: the inquiry into tying product market structure (which is frequently costly and time-consuming) is still required, but if the defendant is found to have market power there, the plaintiff is, in theory, relieved of proving actual harm to competition or of rebutting justifications for the tie-in.

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[8] The Supreme Court itself has used quotation marks in referring to the "per se" rule against certain tie-ins, noting that "tying may have pro-competitive justifications that make it inappropriate to condemn without considerable market analysis." *NCAA v. Board of Regents of the University of Oklahoma*, 468 U.S. 85, 104 n. 26, 104 S.Ct. 2948, 2962 n. 26, 82 L.Ed.2d 70 (1984).

Because the Supreme Court has always recognized that tie-ins in competitive markets are not necessarily dangerous, it has declined to ban all tie-ins. Moreover, although the Court initially adopted the "per se" rule in part because it thought that "tying agreements serve hardly any purpose beyond the suppression of competition," see *Standard Oil Co. v. United States*, 337 U.S. 293, 305, 69 S.Ct. 1051, 1057, 93 L.Ed. 1371 (1949), it has not always been so strict in applying the "per se" rule in tying cases even where the rule's preconditions are met. See, for example, *United States v. Jerrold Electronics Corp.*, 365 U.S. 567, 81 S.Ct. 755, 5 L.Ed.2d 806 (1961) (per curiam), aff'g. 187 F.Supp. 545 (E.D.Pa.1961) ("per se" rule not applicable when rule of reason inquiry inexpensive and conduct that was necessary to establish a new industry was clearly reasonable while in effect). The lower courts have recognized, in effect, a host of defenses to "per se" tying claims. See generally 9 Phillip E. Areeda, *Antitrust Law* ¶¶ 1722-1727 at 285-368 (Little Brown, 1991) (listing exceptions recognized where foreclosure of the tied product market is zero or minimal or the seller had no financial interest in the suppliers of the tied product).

Over time, many commentators and the Antitrust Division of the Justice Department have suggested that even tie-ins in concentrated markets may serve procompetitive purposes, such as quality control, production and sales efficiencies, and facilitation of indirect price competition. In the critics' view, the "per se" rule, weak and riddled with exceptions though it may be, is overinclusive.[9] Four con-

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[9] For the most recent comprehensive statement of this view, see generally 9 Areeda, *Antitrust Law*, especially ¶¶ 1703 at 50-55, 1730 at 406-14.

Beginning with the seminal article by Ward Bowman, *Tying Arrangements and the Leverage Problem*, 67 Yale L.J. 19 (1957), the critics have also questioned the leverage hypothesis. They ask why a monopolist would want to expand control over a *complement* as opposed to a competiting *substitute*, which would in fact be an

curring Justices in *Jefferson Parish* similarly sought to abandon the "per se" approach altogether because it is not truly per se and may condemn too much legitimate conduct. See 466 U.S. at 32-42, 104 S.Ct. at 1568-73 (O'Connor concurring) (favoring rule of reason analysis for all tying arrangements).

Nonetheless, a majority of the Supreme Court has been steadfast thus far in its refusal to jettison either the traditional "per se" nomenclature or the traditional formulation of the test. See *Jefferson Parish*, 466 U.S. at 9-11, 104 S.Ct. at 1556-58 (majority opinion); *id.* at 32, 104 S.Ct. at 1568 (Brennan, joined by Marshall, concurring). Thus, we must apply the traditional "per se" rule (with its recent glosses) unless and until the Supreme Court decides to do away with it. We now apply that doctrine to the facts of this case.

B. The Structure of the Tying Product Market

Because Chrysler has conceded the existence of a tie and that a substantial amount of interstate commerce is affected, it contests only one of the three elements of the "per se" liability test. To prevail on summary judgment on the "per se" claim, Chrysler must show that the plaintiffs raise no triable issue regarding Chrysler's power in the tying product market.

The plaintiffs note that the requirement of market power is really shorthand for an inquiry into the ability to force unwanted products on consumers. It follows, they say, that because the ultimate issue of forcing is in dispute, we

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expansion in the same product market. Other writers, however, have demonstrated that some monopolists can in fact increase their profits by tying, and that in some instances consumers will be hurt on net. In any event, although courts have long had an aversion to tying, the modern economic and legal literature generally agrees that tie-ins need not be, though can be, anticompetitive. See generally Louis Kaplow, *Extension of Monopoly Power Through Leverage*, 85 Colum L Rev 515 (1985).

need not detain ourselves by defining the tying product market and investigating Chrysler's economic power therein. The plaintiffs cite language in *Jefferson Parish* that seems to define "market power" as a "special ability to force a purchaser to do something that he would not do in a competitive market." 466 U.S. at 13-14, 104 S.Ct. at 1558-59.[10] They then point to a number of affidavits in the summary judgment record that they claim (1) tend to show that some consumers are forced to take unwanted autosound systems, hence (2) raise an inference of tying market power, and therefore (3) raise a triable issue as to the presence of a "per se" violation of the Sherman Act. In short, they contend that the district court misapprehended the teachings of *Jefferson Parish* by insisting upon examining preliminary issues regarding market structure when there was plenty of direct evidence of market power and forcing.

In our view, the plaintiffs, not the district court, have misread *Jefferson Parish*. Justice Stevens's majority opinion specifically cautioned against considering market power "in some abstract sense," and in a footnote more precisely defined market power as the seller's ability to sus-

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[10] In *Jefferson Parish*, the most recent Supreme Court case covering a tying claim, a hospital had an exclusive dealing contract with a firm of anesthesiologists which provided that patients would receive anesthesiological services only from members of that firm while they were in the hospital. The plaintiff, an anesthesiologist but not a member of the firm, sued the hospital, claiming that the hospital had illegally tied hospital operating rooms to anesthesiological services.

As discussed in the text, the Supreme Court reaffirmed the validity of the "per se" rule against tying but ruled that the tie-in there was not illegal "per se." According to the Court, anesthesiology and hospital services were separate products, but the hospital possessed insufficient power in the tying (hospital services) market to invoke the "per se" rule. As we will discuss in Part III, the Court also ruled that the plaintiff failed to show an unreasonable restraint on competition in the tied product market (anesthesiology), so that the plaintiff had no rule of reason claim either.

tain prices above levels that would be charged in a competitive market. 466 U.S. at 27 & n. 46, 104 S.Ct. at 1566 & n. 46. See also *Fortner II*, 429 U.S. at 620, 97 S.Ct. at 867 (similar definition). The plaintiffs have it backwards: the Supreme Court has told us to look at market power to see whether courts should *presume* economic harm and rule "per se" for plaintiffs. Direct inquiry into forcing or other harm to competition is what the "per se" analysis is supposed to obviate, although such an approach is appropriate for a rule of reason claim, as we will discuss in Part II.

To determine the existence of market power for purposes of the "per se" test, then, we must first define the relevant tying product market and inquire into whether Chrysler has power over price in that market.[11] Chrysler deserves summary judgment if it can establish that, as a matter of indisputable fact, it lacks sufficient power in the tying product market (as properly defined) to create a triable "per se" claim.[12]

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[11] To the extent that *Digidyne Corp. v. Data General Corp.*, 734 F.2d 1336, 1339-41, 1344-46 (9th Cir. 1984), suggests that defining the tying product market is generally unnecessary on a "per se" claim because power over a portion of the market (there, "locked in" purchasers of system software) is sufficient, we disagree with it. That may have been the Court's view in *Fortner I*, 394 U.S. at 502-04, 89 S.Ct. at 1258-59, but the Court retreated from this position in *Fortner II* and *Jefferson Parish*, 466 U.S. at 26-28, 104 S.Ct. at 1565-66. See also *Data General Corp. v. Digidyne Corp.*, 473 U.S. 908, 908-09, 105 S.Ct. 3534, 3534-35, 87 L.Ed.2d 657 (1985) (White, joined by Blackmun, dissenting from denial of certiorari) (questioning the Ninth Circuit's opinion for this and other reasons, including the opinion's presumption that a copyright confers market power and its conclusion that power to force is established by a demonstration that some buyers find the tying product uniquely desirable).

[12] More precisely, the plaintiffs, not Chrysler, shoulder the burden of defining the relevant tying product market. To win summary judgment on the "per se" theory, a defendant need only show that the *plaintiff* has *failed* to make any showing that the defendant has

The Supreme Court has given us considerable guidance on what constitutes sufficient tying market power to condemn a tie "per se." As the Court noted in *Jefferson Parish*, courts have typically found sufficient economic power in the tying market to condemn tying arrangements "per se" when: (1) the defendant has a patent or other government-granted monopoly over a product; (2) the defendant's share of the market is so high that it occupies a dominant market position; or (3) the defendant offers a unique product or possesses a market advantage not shared by its competitors. 466 U.S. at 16-17, 104 S.Ct. at 1560-61. As the first and the third factors demonstrate, the questions of market definition and market power may blend. If a defendant offers a unique and nonreplicable product, for example, other products may not be adequate substitutes for it, and hence are not part of the same market.[13]

The plaintiffs' basic theory is that the relevant tying product market consists only of new Chrysler cars manu-

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power in an economically and legally relevant tied product market. When opposing Chrysler's summary judgment motion, the plaintiffs must tell us the facts that they wish to prove at trial. If their sole proffered definition of the tying product market is wholly implausible, they have no triable "per se" case, whether or not Chrysler's definition is indisputable. For present purposes, however, that fine point does not matter. We easily conclude that the tying product market includes not only Chrysler-manufactured cars sold in the United States, but also all new automobiles competing with those cars (precisely the market definition that Chrysler proposes), and that Chrysler has no power over prices in that market.

[13] Market definition (product or geographical) always involves the difficult task of line drawing, so that the two-step process of (1) market definition and (2) determinaton of power therein is unavoidably somewhat artificial. The important question for present purposes is the ultimate one: whether Chrsyler has power over pricing its cars, such that we must presume (under the logic of the "per se" rule) that it is exploiting its leverage in the autosound market.

factured for sale in the United States.[14] If the market were so defined, of course Chrysler would have market power, being the sole seller. But such a narrow definition makes no sense in terms of real world economics, and as a matter of law we cannot adopt it.

The plaintiffs do not contend, nor seriously could they, that Chrysler's patents on several car components make Chrysler cars a one-brand market or give Chrysler any market power. They do contend, however, that CHRYSLER, PLYMOUTH, and DODGE are popular trademarks, making Chrysler cars unique products with an advantage not shared by would-be competitors, and hence infusing Chrysler with market power. But "a prestigious trademark is not itself persuasive evidence of economic power" because a trademark, unlike a patent, protects only the name or symbol and not the product itself. *Mozart Co. v. Mercedes-Benz of North America, Inc.*, 833 F.2d 1342, 1346 (9th Cir 1987). Chrysler cars may be "unique" in a broad sense of the term, but "[u]niqueness confers economic power only when other competitors are in some way prevented from offering the distinctive product themselves." *Fortner I*, 394 U.S. at 505 n. 2, 89 S.Ct. at 1260 n. 2. Despite Chrysler's trademark, GM, Ford, Toyota, Honda, and other auto manufacturers are perfectly capable of producing functionally similar and competitive products. The plaintiffs offer no evidence that Chrysler's marks are so strong that consumers consider Chrysler's products wholly distinct and not competitive with other manufacuturers' cars.[15]

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[14] The parties appear to agree that the relevant geographic market is the entire United States, rather than any particular region. Neither party suggests that used cars belong in the market.

[15] The plaintiffs do cite several old cases that viewed trademarks as creating presumptions of market power. But modern courts and commentators reject this position. See, for example, *Grappone v. Subaru of New England*, 858 F.2d 792, 796-97 (1st Cir 1988) (almost all sellers of branded products have some loyal customers,

Moreover, the plaintiffs' proposed market definition conflicts with principles of market definition that are well-established in antitrust law. The relevant product market includes Chrysler cars *and* cars that are reasonably interchangeable with Chrysler cars. See *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 404, 76 S.Ct. 994, 1012, 100 L.Ed. 1264 (1956). In technical terms, the market also includes other manufacturers' vehicles that have a significant cross-price elasticity of demand with Chrysler cars. *Id.* at 400, 76 S.Ct. at 1010. Put more simply, a market also includes actual or potential competitors who may take business away from each other. *SmithKline Corp. v. Eli Lilly & Co.*, 575 F.2d 1056, 1063 (3d Cir 1978).

Except in rare circumstances, courts reject market definitions consisting of one supplier's products where other brands compete. One of the classic cases, in fact, dealt with automobile brands. In *Packard Motor Car Co. v. Webster Motor Car Co.*, 243 F.2d 418 (D.C.Cir.1957), the the court rejected a market definition consisting only of Packard automobiles precisely because other cars were "reasonably interchangeable by consumers for the same purposes." *Id.* at 420 (applying the *du Pont* test). Proposed Chrysler-only product market definitions have fared no better in the courts. See *Kingsport Motors, Inc. v. Chrysler Motors Corp.*, 644 F.2d 566, 571 (6th Cir.1981); *Merit Motors, Inc. v. Chrysler Corp.*, 417 F.Supp. 263, 269-70 (D.D.C. 1976) aff'd. 569 F.2d 666 (D.C.Cir.1977). See also *Mogul v. General Motors Corp.*, 391 F.Supp. 1305, 1313 (E.D.Pa.1975) (relevant product market could not be limited to Cadillacs), aff'd without published opinion, 527 F.2d 645 (3d Cir 1976) (table).

Most tellingly, in this case Chrysler has offered unrebutted affidavits confirming what everyone who watches

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but this alone is insufficient to prove market power for purposes of the "per se" rule); Phillip E. Areeda and Herbert Hovenkamp, *Antitrust Law* ¶ 511.1 at 488-89 (1991 Supp) and cases cited therein.

television or goes to an automobile dealership already knows—that Chrysler cars compete vigorously with many other companies' automobiles. Chrysler's affidavits demonstrate that new car buyers commonly compare Chrysler cars with other cars; that Chrysler's sales depend on its cars' comparative prices and features; that Chrysler's advertising compares the price and features of its autos with other companies'; that the media perceive Chrysler as competing with other brands; and that Chrysler's pricing is constrained by the prices its competitors charge for comparable automobiles. We conclude that the district court was correct to define, as a matter of law, the tying product market to include all new automobiles sold in the United States.[16]

The Supreme Court has also suggested that courts consider evidence of market share when determining the existence of tying market power. *Jefferson Parish*, 466 U.S. at 17, 26-27, 104 S.Ct. at 1560, 1565-66. Here it is uncontroverted that over the relevant time period, Chrysler-manufactured cars accounted for only 10-12 percent of the automobiles sold in the United States. In *Jefferson Parish*, the Court held that the defendant hospital's 30 percent market share showed that it lacked the "kind of

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[16] The plaintiffs offer no creditable evidence to the contrary. Their only submission that is even arguably relevant to this issue is an affidavit by their expert, Dr. F. Gerard Adams, who simply concluded that the market alleged by the plaintiffs in their complaint is proper. In our view, Dr. Adams was merely agreeing with the plaintiffs' definition of the *tied* product market; nowhere does he specifically say anything about the tying product market or explain how Chryslers do not in fact compete with other cars. The documents that this affidavit cross-references relate to the autosound market, not the automobile market. Even if we believed that Dr. Adams meant to approve of the plaintiffs' definitions of both tying and tied product markets, his affidavit would be insufficient to raise a triable issue of fact. For purposes of *tying* product market definition, it is wholly conclusory and sets forth no specific facts or reasoning and therefore cannot defeat summary judgment. See FRCP 56(e); *Lujan v. Natural Wildlife Federation*, —— U.S. ——, 110 S.Ct. 3177, 3188, 111 L.Ed.2d 695 (1990).

dominant market position that obviates the need for further inquiry into actual competitive conditions." *Id.* at 27, 104 S.Ct. at 1565. See also *Times-Picayune*, 345 U.S. at 612-13, 73 S.Ct. at 882-83 (newspapers' 33-40 percent share of advertising market insufficient to invoke "per se" rule). Certainly Chrysler's small share of the domestic automobile market provides unrefuted evidence that it lacks power in the tying product market.[17]

The plaintiffs nonetheless contend that the definition of the tying product market and the existence of market power therein are issues of fact that we should not weigh and should leave to the jury to decide. The question of market power is certainly dependent on factual findings, and some older cases did state that summary judgments against plaintiffs are particularly disfavored in complex antitrust cases. See, for example, *Fortner I*, 394 U.S. at 500, 89 S.Ct. at 1257 (citing *Poller v. CBS, Inc.*, 368 U.S. 464, 473, 82 S.Ct. 486, 490, 7 L.Ed.2d 458 (1962)). But many courts, including the Supreme Court, have more recently held defendants entitled to summary judgment in antitrust cases. See, for example, *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986); *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 289-90, 88 S.Ct. 1575, 1592-93, 20 L.Ed.2d 569 (1968); *Collins v. Associated Pathologists, Ltd.*, 844 F.2d 473, 475 (7th Cir 1988). It may be that because antitrust cases are so factually intensive that summary judgment occurs proportionately less frequently there than in other types of litigation, but the standard of FRCP 56 remains the same.

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[17] Although courts can also infer market power from direct evidence of sustained supranormal profits rather than indirectly from evidence of market shares, the plaintiffs have offered no such evidence here. The plaintiffs complain that they have been denied discovery as to the profitability of Chrysler's *autosound* sales, but evidence of Chrysler's overall profitability from automobile sales is easily available from public sources and, not surprisingly, the plaintiffs have declined to introduce it.

In our view, the plaintiffs' submissions do not establish any genuine issue of material fact as to Chrysler's economic power in the automobile market. We therefore conclude that Chrysler has no significant power in the tying product market. Because one of the prerequisites to applying the "per se" rule is not present, we will affirm the district court's grant of summary judgment on the "per se" claim.

III. RULE OF REASON LIABILITY

We next consider the plaintiffs' claims under the rule of reason. At times during this litigation, Chrysler has suggested that the "per se" and rule of reason tests have converged—that a finding of no tying market power during the "per se" inquiry automatically dictates dismissal of the rule of reason claims. At other times, Chrysler has suggested that although the quantity or degree of tying market power necessary to sustain a rule of reason claim may be somewhat smaller than for a "per se" claim, a significant amount of tying market power remains a prerequisite for a rule of reason claim. We regret both views as inconsistent with the position of the majority in *Jefferson Parish*. We do insist, however, that to defeat summary judgment on a rule of reason claim, a plaintiff must offer a plausible theory of how the defendant's tie-ins is causing injury cognizable by the antitrust laws, for that is what the Supreme Court's jurisprudence requires. It is on this hurdle that these plaintiffs stumble and, as a result, their rule of reason claim must fall.

A. *The Nature of a Rule of Reason Tying Claim*

Although tying claims and the rule of reason have coexisted in antitrust law for eighty years, the case law on tying claims under the rule of reason is amazingly sparse. The Supreme Court has been consistent in holding that rule of reason claims are still available to plain-

tiffs who do not succeed with their "per se" claims. See, for example, *Jefferson Parish*, 466 U.S. at 17-18, 104 S.Ct. at 1561-62; *Fortner I*, 394 U.S. at 499-500, 89 S.Ct. at 1256-57; *Times-Picayune*, 345 U.S. at 614-15, 73 S.Ct. at 883-84. But because the Court was historically so favorable toward "per se" tying claims, plaintiffs have rarely bothered to make rule of reason tying claims, having in mind, no doubt, such claims' attendant additional requirement of proving causation of anticompetitive effects and perhaps the necessity at trial of rebutting defendants' justifications.

For example, although in *Fortner I*, 394 U.S. at 500, 89 S.Ct. at 1257, the Court specifically suggested to the plaintiffs that they could proceed on a rule of reason claim as well as "per se" claim, the plaintiffs did not pursue that suggestion. See *Fortner II*, 429 U.S. at 612 n. 1, 97 S.Ct. at 863 n. 1. See also *Image Technical Services, Inc. v. Eastman Kodak Co.*, 903 F.2d 612, 615 n. 1 (9th Cir 1990) (rule of reason theory not considered because plaintiff did not raise it until appeal), cert. granted, —— U.S. ——, 111 S.Ct. 2823, 115 L.Ed.2d 994 (1991). Indeed, until Chrysler's petition for rehearing, the briefs in this case paid scant attention to rule of reason issues. Because tying cases brought under the rule of reason may become more frequent now that the Supreme Court has become less expansive in its view of liability under the "per se" rule in *Fortner II and Jefferson Parish*, we will explain in some detail our view of what the threshold requirements for a rule of reason claim are.[18]

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[18] We need not detail the prerequisites that are clear from the applicable statutes and are not at all issue here. For example, a prerequisite to all Sherman Act claims is an effect on interstate or international commerce, but both parties agree that Chrysler's actions have an effect on interstate commerce.

1. No Requirement that the Seller Have Power in the Tying Product Market

Chrysler is undoubtedly correct that the tying cases have primarily been concerned with the leveraging of economic power from the market for one product into the market for another, with the resulting forcing of consumers to take unwanted products and foreclosure of competitors from the tied product market. Many Supreme Court cases on tying have intimated that tie-ins deserve special scrutiny only when the defendant has power in the tying product market. See, for example, *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 6, 78 S.Ct. 514, 518, 2 L.Ed.2d 545 (where seller has no dominance over the tying product, it has no effectual weapon to pressure buyers, hence restraint of trade is "insignificant at most"). The "per se" sections of the majority opinion in *Jefferson Parish* similarly suggest that the primary evil of tying consists of market power extension. See, for example, 466 U.S. at 25, 104 S.Ct. at 1564 ("Only if patients are forced to purchase Roux's services as a result of the hospitals' market power would the arrangement have anticompetitive consequences."); *id.* at 12, 104 S.Ct. at 521 ("the essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product"); *id.* at 14, 104 S.Ct. at 1558 (ties condemned where power used to impair competition in another product market).

In Chrysler's view, extension of power from tying to tied product markets is the *only* manner in which a tie-in can cause antitrust injury. Chrysler thus suggests that its indisputable lack of power in the automobile market is proof that it *cannot* have caused significant economic harm in the tied product market; the plaintiffs' proffer of empirical evidence of economic harm must, according to Chrysler, be disregarded as proof of the impossible. Chrysler thus would have us adopt, in effect, a reverse per se rule in favor of defendants: when an

inquiry into the structure of the tying market shows that the defendant has no market power there, we should conclusively presume no adverse effects on the tied product market.

In essence Chrysler asks us to adopt an expansive reading of Justice O'Connor's concurring opinion for four Justices in *Jefferson Parish*. The concurring Justices wanted to do away with the "per se" rule altogether and to adopt a unitary standard, including a tying market power requirement, for all tying claims premised on extension of power from tying to tied product market. 466 U.S. at 37, 104 S.Ct. at 1570 (O'Connor, joined by Burger, Powell, and Rehnquist, concurring). According to Justice O'Connor,

> such extension of market power is unlikely, or poses no threat of economic harm, unless the two markets in question and the nature of the two products tied satisfy three threshold criteria.
>
> First, the seller must have power in the tying-product market. Absent such power tying cannot conceivably have any adverse impact in the tied-product market, and can only be procompetitive in the tying-product market.

Id. (footnotes omitted).[19]

Justice O'Connor may not have meant to endorse a market power requisite for tying claims based on a theory other than power leveraging.[20] Moreover, even if she

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[19] The other two prerequisites the concurring Justices would have imposed were "a substantial threat that the tying seller will acquire market power in the tied-product market," id at 38, 104 S.Ct. at 1572, and "a coherent economic basis for treating the tying and tied products as distinct," *id.* at 39, 104 S.Ct. at 1572.

[20] The concurrence also suggested that tying might be undesirable if it serves as a means to evade regulatory price controls or if it enables the seller to engage in price-discriminaation by metering demand. *Id.* at 37 n. 4, 104 S.Ct. at 1571 n. 4. The former theory does not require market power, and Justice O'Connor had

did, the majority of the Court in *Jefferson Parish* certainly declined to adopt that view. The majority insisted on retaining the distinction between "per se" and rule of reason tying claims, and its distinction was more than nominal. Distinguishing "per se" claims from rule of reason claims, Justice Stevens wrote:

> When, however, the seller does not have either the degree or the kind of market power that enables him to force customers to purchase a second, unwanted product in order to obtain the tying product, an antitrust violation can be established only by evidence of an unreasonable restraint on competition in the relevant market.

466 U.S. at 17-18, 104 S.Ct. at 1560-61. From that language, we must conclude that the majority, at least, believed that to make out a rule of reason claim, a plaintiff need not make the same showing of tying market power that is necessary as a prerequisite to a "per se" claim.[21]

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no reason to endorse or reject a market power requirement in general in *Jefferson Parish*. Thus Chrysler arguably overstates the views of the concurring Justices as well as the majority.

[21] Chrysler suggests that Justice Steven's next paragraph effectively negated the sentence quoted in the text. That paragraph reads, in its entirety:

> In sum, any inquiry into the validity of a tying arrangement must focus on the market or markets in which the two products are sold, for that is where the anticompetitive forcing has its impact. Thus, in this case our analysis of the tying issue must focus on the hospital's sale of services to its patient, rather than its contractual arrangements with the providers of anethesiological services. In making that analysis, we must consider whether petitioners are selling two separate products that may be tied together, and, if so, whether they have used their market power to force their patients to accept the tying arrangement.

[Continued]

Chrysler contends that even if the *same* showing is not required for "per se" and rule of reason cases, then at least *some* showing of tying market power is required, but again we must disagree. The just-quoted passage from *Jefferson Parish* suggests that the majority favored direct inquiry into the effects that the tie-in causes in the tied product market (anesthesiology in that case), rather than any inquiry into the structure of the tying product market (hospital services there). That interpretation is confirmed by Court's actual analysis of the rule of reason claim in Part V of *Jefferson Parish*, 466 U.S. at 29-31, 104 S.Ct. at 1566-67, which contains no hint of a market power requirement for rule of reason claims. Instead, Justice Stevens there stressed that evaluation of the reasonableness of a tying arrangement's restraint on competition "necessarily involves an inquiry into the actual effect of the exclusive contract on competition among anesthesiologists." 466 U.S. at 29, 104 S.Ct. at 1566. See also *id.* at 30 n. 49, 104 S.Ct. at 1567 n. 49 (seeking "empirical demonstration concerning the effect of the arrangement on price or quality").

Chrysler points to passages from the "per se" section of Justice Stevens's opinion that focus on extension of market power and says that the majority implicitly re-

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[21] [Continued]

466 U.S. at 18, 104 S.Ct. at 1561. Chrysler says that because the first sentence discusses "any inquiry into the validity of a tying arrangement," the entire paragraph also covers rule of reason claims, and that the last phrase shows that the majority still requires a showing of power in the tying product market in rule of reason claims.

Although that argument seems powerful, it ignores the beginning of the second sentence, which indicates that the Court was talking about what its inquiry *in that case* would involve. In *Jefferson Parish*, the primary issue was the "per se" claim, so of course the Court had to consider tying market power. The issue is not free from doubt, but we are reluctant to read that paragraph (or, as explained in the text, the entire majority opinion) as insisting on a showing of tying market power when making a *rule of reason* claim.

lied in part on the hospital's lack of tying market power in its rule of reason analysis as well. That argument has considerable force. But if the hospital's lack of tying market power was itself conclusive, as Chrysler suggests, surely the Court would have at least mentioned it in the rule of reason discussion, and it did not.

In sum, we decline to read *Jefferson Parish* as approving Chrysler's view that courts deciding a rule of reason claim may ignore proffered evidence of actual conduct and economic performance in the *tied* product market simply because of a finding on *tying* product market structure. See also *Fortner II*, 429 U.S. at 612 n. 1, 97 S.Ct. at 863 n. 1 (implying that U.S. Steel's lack of power in the market for credit, the tying product market, would not necessarily have been fatal to Fortner's rule of reason claim). Instead we read the majority opinion as rejecting Chrysler's proposal for an across-the-board prerequisite of tying market power, just as it rejected the proposal to abandon the "per se" rule altogether.

Chrysler correctly notes that several other courts of appeals have reached different results, but we find the analyses in those opinions unpersuasive. In dictum in *Amey, Inc. v. Gulf Abstract & Title, Inc.*, 758 F.2d 1486, 1502-03 (11th Cir 1985), the court asserted that *Jefferson Parish* continues to require, even in rule of reason cases, all five of the factors listed in a pre-*Jefferson Parish* Second Circuit case, *Yentsch v. Texaco, Inc.*, 630 F.2d 46, 56-57 (2d Cir 1980), one of which factors was "sufficient market power in the tying product market to force the buyer to accept the tied product." Unfortunately, the cited page in *Jefferson Parish* (104 S.Ct. at 1568) does not support a requirement of all of those factors for rule of reason claims (certainly not one of tying product market power), and in any event the Eleventh Circuit's holding turned on factors that are not at issue here. See 758 F.2d at 1503.

Hand v. Central Transport, Inc., 779 F.2d 8, 11 (6th Cir 1985) (per curiam), did summarily hold that a seller

must have tying market power to be guilty of a rule of reason violation, but the decision (which in fact reversed the district court's ruling of no market power) relied on the concurrence in *Jefferson Parish*, not the majority opinion. We cannot rely on the concurrence when in our view the majority opinion fundamentally conflicts with it. Similarly, *Carl Sandburg Village Condominium Association No. 1 v. First Condominium Development Co.*, 758 F.2d 203, 210 (7th Cir 1985), relied only on Justice O'Connor's minority concurring opinion in requiring power in the tying product market. Moreover, the court's opinion turned on the defense that the tying product seller had no economic interest in the sales of the tied product seller, hence was not expanding into the tied product market. Finally, *Great Escape, Inc. v. Union City Body Co.*, 791 F.2d 532, 537-38 (7th Cir 1986), did not even discuss *Jefferson Parish;* it therefore hardly counts as a reasonable interpretation of *Jefferson Parish.*[22]

Other cases from courts of appeals may implicitly agree with the interpretation of *Jefferson Parish* put forth here when they recite that to prove a rule of reason claim, a plaintiff must demonstrate actual anti-competitive effects —with no mention of how tying market power fits into that analysis. For example, Judge Breyer's scholarly opinion in *Grappone, Inc. v. Subaru of New England,*

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[22] In several other cases not relied on by Chrysler for this proposition, courts of appeals have generically described the requirements for demonstrating an illegal tying claim as including tying market power. *See Xeta, Inc. v. Atex, Inc.*, 852 F.2d 1280, 1282-83 (Fed Cir 1988); *Wells Real Estate, Inc. v. Greater Lowell Board of Realtors*, 850 F.2d 803, 814 (1st Cir 1988); *Will v. Comprehensive Accounting Corp.*, 776 F.2d 665, 670-74 (7th Cir 1985); *Jack Walters & Sons Corp. v. Morton Building, Inc.*, 737 F.2d 698, 702 (7th Cir 1984). But those cases did not distinguish between "per se" and rule of reason claims and may only have meant to cover "per se" claims. These cases merely cite the "per se" portion of *Jefferson Parish* and do not explain how, if their holdings do cover rule of reason claims, those holdings are consistent with the words and deeds of the *Jefferson Parish* majority when specifically considering the rule of reason claim there.

Inc., 858 F.2d 792 (1st Cir 1988), discussed the rule of reason claim solely in terms of whether the anti-competitive effects there outweighed the business justifications. *Id.* at 799-800. That discussion followed an extended discussion of the requirement of tying market power in the "per se" portion of the opinion, *id.* at 794-98, yet never intimated that tying market power was also a prerequisite to a rule of reason claim. See also F.M. Scherer and David Ross, *Industrial Market Structure and Economic Performance* 568 (Houghton Mifflin, 3d ed 1990) (reading *Jefferson Parish* to say that where seller lacks tying market power, restraint is judged under rule of reason); *Ware v. Trailer Mart, Inc.*, 623 F.2d 1150, 1153-54 (6th Cir 1980) (pre-*Jefferson Parish* opinion citing *Fortner I* and holding that tying market power is not a prerequisite to a rule of reason claim). At all events, even if Chrysler's position is the sounder as matter of economics, and even if Chrysler accurately predicts the direction in which the Supreme Court is heading, still-binding precedent forecloses our adopting Chrysler's proposed rule.[23]

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[23] The economic (as opposed to legal precedential) soundness of a requirement of tying market power for a rule of reason claim is a matter of academic debate. Some commentators agree with the concurring Justices in *Jefferson Parish*. See, for example, Herbert Hovenkamp, *Economics and Federal Antitrust Law* § 8.3 at 217-19 (1985) (tying arrangement in competitive market can cause no harm because seller cannot impose unwanted second product without compensating buyer; hence tie-in must be "efficiency-creating"). Most of the work of "Chicago School" theorists has centered on the general proposition that significant economic harm cannot occur (and hence the antitrust laws should not interfere) in competitive markets. See, for example, Frank H. Easterbrook, *The Limits of Antitrust*, 63 Tex L Rev 1, 20-21 (1984) ("Firms that lack [market] power cannot injure competition no matter how hard they try.").

But other commentators, for varying reasons, suggest that economic harm from tie-ins is possible, although not probable, where the tying product market is competitive. See 9 Phillip E. Areeda, *Antitrust Law* ¶¶ 1728b at 369-70, 1728d at 371-72, 1729 at 375-406 (1991) (harm from foreclosure of substantial share of concentrated tied product market still possible without power in tying product

2. The Need to Set Forth a Viable Theory of Causation of Antitrust Injury

It does not follow, however, that *every* defendant's motion for summary judgment on a rule of reason claim must be denied. Obviously, if the plaintiff cannot come up with evidence of injury to competition, not simply to the plaintiffs themselves, then summary judgment is appropriate. See *Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477, 97 S.Ct. 690, 50 L.Ed.2d 701 (1977). More generally, a rule of reason plaintiff must allege a plausible theory of causation of "injury of the type the antitrust laws were designed to prevent." *id.* at 489, 97 S.Ct. at 697. See also *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 109-13, 107 S.Ct. 484, 488-90, 93 L.Ed.2d 427 (1986) (same standard when injunctive relief sought); *Jack Walters & Sons Corp. v. Morton Building, Inc.*, 737 F.2d 698, 708-09 (7th Cir 1984) ("[the *Brunswick* rule] is the application to antitrust law of venerable principles of tort causation").

In a "per se" case, the usual theory of causation of harm is familiar and, under the logic of the "per se" rule, need not be proved: the defendant is alleged to have market power and if so is presumed to be using that power to expand its control into another market. Similarly, a plaintiff's rule of reason claim may be based on

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market); Richard Craswell, *Tying Requirements in Competitive Markets: The Consumer Protection Issues*, 62 BU L Rev 661 (1982) (tie-ins in competitive markets may be linked to market failures caused by imperfect information, although antitrust laws may not be the best solution to this consumer protection problem); W. David Slawson, *Excluding Competition Without Monopoly Power: The Use of Tying Arrangements to Exploit Market Failure*, 36 Antitrust Bull 457 (1991) (favoring broader "per se" rule, even where seller has no power in tying product market, but with expansive affirmative defenses).

Because we believe that we are bound by *Jefferson Parish* unless and until the Court changes its mind, we need not take sides in this debate.

leveraging of market power. But where a defendant indisputably proves that it lacks sufficient power in the tying product market, a plaintiff's power leveraging claim, whether packaged in "per se" or rule of reason terms, falls apart. As Professor Areeda has written:

> With zero power in the market for the tying product, a tie-in cannot be a vehicle for distorting competition in a second market. Any purchaser buying the second product from the defendant does so voluntarily, or at least for reasons other than an unrequited desire for the tying product.

9 *Antitrust Law* ¶ 1728d at 371-72. Here we have concluded that Chrysler has no tying market power to exploit—no possibility of expanding a nonexistent automotive empire into the autosound market.[24] If forced sales and other anticompetitive effects are occurring, as the plaintiffs allege, they cannot be due to Chrysler's domi-

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[24] The plaintiffs claim that the "synergy" between Chrysler's eleven percent share of the automobile market, some customers' loyalty, and Chrysler's trademarks creates a triable issue over whether Chrysler can exploit those factors to "force" sales of unwanted radios—under the rule of reason, even if not under the "per se" rule. In our view, on these facts at least, the power extension theory is no more triable under the rule of reason than it is under the "per se" rule.

Of course, tying market power is not a binary issue (present or not present), but a question of degree. Perhaps, as both sides have at times suggested, the minimum power threshold for a leverage-based rule of reason claim should be lower than for a "per se" claim. Justice Stevens's "kind or degree" language in *Jefferson Parish*, 466 U.S. at 18, 104 S.Ct. at 1561 (quoted at 483), certainly supports that interpretation. But in practice, although economists use indices, market power is difficult to measure with precision.

At all events, here the plaintiffs have no reasonable argument that Chrysler has any significant leverage from the automobile market. Thus, although in theory there may be cases in which the plaintiffs can proceed on a leverage-based theory under the rule of reason but not under the "per se" rule, this is not a case that requires us to venture onto the slippery slope of market power quantification.

nance in the automotive market, but instead to something else. We insist that before going to trial the plaintiffs tell us what else: they must state *some* plausible theory of antitrust harm that does not depend implicitly on power leveraging. To the extent that *res ipsa loquitur* ("the thing speaks for itself") is a doctrine of the antitrust laws, it is limited to per se cases.

We cannot list exhaustively the viable non-leverage-based theories that a rule of reason plaintiff may make. We simply hold that a plaintiff may not proceed to trial simply because it presents some evidence that the defendant is engaged in tying and some evidence that some injury is occurring. A plaintiff must link the two showings with a theory of causation that is both plausible and cognizable by the antitrust laws.

B. *The Plaintiffs' Theories of Causation*

Although Chrysler has conceded the existence of a tie, and although the plaintiffs proffer otherwise sufficient evidence of injury to consumers as well as to themselves, we conclude that the plaintiffs allege no triable theory to link the alleged weapon to the alleged injury. From the plaintiffs' submissions, we can discern several theories of harm. We have already rejected the triability of the theories of harm based on leveraging of market power; we now consider (and reject) the others in turn.[25]

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[25] We decide this case on Chrysler's motion for summary judgment, not on the pleadings. If the plaintiffs believed that they have not had ample discovery to determine precisely how Chrysler's challenged practices are hurting them, then the proper approach would have been to file a motion under FRCP 56(f) identifying the additional documents needed. The plaintiffs have not done so. The plaintiffs do assert that they were denied discovery as to the profitability of Chrysler's autosound sales, but even if they had not waived the point by failing to file a Rule 56(f) motion, we do not see how the requested information (if available) could help them over the causation hurdle.

1. Forced Purchase of Inferior Goods

By definition, in no free market can buyers be forced to pay more for a package than they think that the package is worth at the time of purchase. In an uncompetitive market, however, buyers may be forced to pay more for the same package than they would have to pay in a competitive market (or, equivalently, to accept lesser quality for the same price). That is the evil of "forcing" that has concerned the Supreme Court.

Because the market for automobiles is competitive, however, no auto manufacturer can profitably sustain supracompetitive prices for its cars—or for car-plus-sound-system packages. Therefore, a car buyer who actually considers the autosound system will not be forced to take an unwanted *package* or to pay a supracompetitive price for the package (assuming that the local car dealership market has no dominant seller).[26] See Hovenkamp, *Economics and Federal Antitrust Law* § 8.3 at 217-18 (forced purchase of unwanted product is equivalent to a price increase, which seller cannot sustain in competitive market without compensating the buyer in another way). No doubt many of these buyers will not find their sound systems ideal even at the time of purchase, but buyers compromise and bargain based on price and the total package of fuel economy, comfort, performance, repair record, styling, autosound system, etc., with the result that the overall price for the package will not be too high. In sum, the competition in the automobile market adequately protects those consumers who consider autosound systems when buying their cars from having to pay too much.

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[26] As we discuss below, this is so whether or not the buyers know the underlying prices for each component: if the package is not worth the package price, or another manufacturer's package is a better deal on net, the car buyer will offer less or go elsewhere.

We consider buyers who fail to consider autosound systems when buying their cars in the next subsection.

The plaintiffs' proffers do not seriously challenge this logic. The plaintiffs do offer survey data showing that Chrysler buyers tend to buy from dealers' lots more frequently than Ford or GM buyers, and thus tend to compromise more on their options packages. "Options clustering" is the tying of one option to another, and hence is not quite the same thing as standardizing the sound system, but even if we were to equate the two, all that the survey shows is that consumers are forced to *compromise*. The study does not rebut the point that if consumers do not like the price for the entire package of performance, color, styling, autosound system, etc., then they can easily shop elsewhere for a price and package that please them more.

Indeed, a second study from 1986 showed that Chrysler might lose 11.1 percent of its potential customers if it failed to present desirable options packages. The plaintiffs read that study as saying that 88.9 percent of Chrysler customers will accept options (or sound systems) that they find undesirable, but that does not follow, even assuming that the study applies to standardized autosound systems as well as to clusters of options.

The study divides Chrysler buyers into several groups. Some buyers are special order buyers, who by definition order individual options or a package that they specifically want at the going price. The remainder are stock buyers, a portion classified as "patient," the remainder "impatient" and hence more likely to compromise. Some of these customers will wait for an acceptable car from the same dealer or go to another dealer for the same model or a different make; the market thus works to protect them. Other customers will take the car "as is" but only if they are offered a price discount on the options package; the market obviously works for them, too. The remainder consists of those who are indifferent to options, so may take the same car regardless of the options package. This group may buy cars with options (or

sound systems) that they did not desire beforehand,[27] but they are not truly forced to take an undesired package at an uncompetitive price because they are perfectly free to buy cars (packaged with other options and autosound systems) elsewhere.

No doubt, some customers would be most happy purchasing every option or feature à la carte.[28] The plaintiffs proffer survey evidence that 13.4 percent of Chrysler buyers would have preferred another brand of autosound system than they actually bought, and 20.8 percent would at least have preferred to have the option to take their Chrysler cars without the sound system that came with their cars. The plaintiffs suggest that this is direct evidence of consumer injury through anticompetitive forcing. But these numbers do not show that purchasers of Chrysler cars and autosound systems had to pay supracompetitive prices. Once again, because the automotive market is competitive, a consumer can demand compensation for taking a less desirable sound system in the form of a lower price for the vehicle or for optional features.

The plaintiffs also cite dealer complaints and exhortations in internal memos to improve autosound quality as evidence that Chrysler sound systems were of poor quality and overpriced. In the same documents, however, there are complaints about batteries, water leaks, windshields, horns, switches, etc. Surely we do not have an antitrust problem every time a manufacturer makes a lemon model; an antitrust issue only arises when the mar-

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[27] According to the plaintiffs' consumer survey, only 43.3 percent of buyers of Chrysler cars bought the type of autosound equipment that was on their cars because they wanted it beforehand, and only 15.4 percent specifically preferred Chrysler's brand of autosound equipment.

[28] Others would not, for at least two reasons. First, they may not know how well options will fit together. Second, due to production efficiencies, installing individual preferences is more expensive than installing a standard options package.

ket is incapable of disciplining sellers in the form of lowered demand in the future. In other words, evidence of *some* consumer dissatisfaction is insufficient to raise a triable claim unless linked to a showing that consumers have little realistic choice to buy comparable goods at a comparable price elsewhere.

Here the plaintiffs show forced compromise, not forced sales. The most probable reason for the dealer complaints and exhortations is that the sound systems (if poor) were hurting Chrysler cars' competitiveness versus other vehicles. Those documents thus show, if anything, that Chrysler was *unable* to get away with shoddy autosound systems—that the market was working, not failing. At all events, standing alone the internal Chrysler documents are evidence of consumer dissatisfaction, but not necessarily "injury of the type the antitrust laws were meant to prevent," *Brunswick*, 429 U.S. at 489, 97 S.Ct. at 697, because the competitive automobile market is capable of providing the proper incentives.

2. Consumer Surprise

The plaintiffs' other primary theory of causation rests on the premise that many car buyers do not comparison shop for autosound systems at the time of their car purchase, in part because for most purchasers the sound system is unimportant compared to the rest of the car. They therefore may be surprised after purchasing the car to find that the sound system was not as good as they expected.[29] In contrast, according to the plaintiffs, if con-

[29] The plaintiffs also offer evidence that some consumers do consider autosound systems (and hence are not surprised), but consider them as only a second factor. For these consumers, the autosound system matters but will rarely be a deal-breaker by itself, again because it is a small fraction of the total price. But for them, the argument of the last section applies: nothing prevents these consumers from going elsewhere. Chrysler may force them to compromise, but it cannot force them to accept an inferior package at an inflated price, which is the concern of the antitrust laws.

sumers purchased (or at least could purchase) their sound systems separately, they would be more likely to get what they wanted at a fair price. To put it bluntly, Chrysler's tie-in may well take advantage of consumer laziness.

In most markets, so long as *some* buyers are knowledgeable and comparison shop, the rest are protected because the market mechanism will ensure one competitive price for all buyers. Absent an ability to price discriminate, even a monopolist must offer a single price that responds to how much the marginal consumer would pay, not the inframarginal or even the average consumer. See, for example, Robert S. Pindyck and Daniel L. Rubinfeld, *Microeconomics* § 8.3 (Macmillan, 1989). We all free ride in this manner. Even though some buyers of motor oil, for example, are unknowledgeable about that product or are not price conscious, they can rest assured that they will not have to pay any more than the knowledgeable customer in line ahead of them at the automotive supply store, and not much more than the price at other automotive supply stores, because the retail industry is highly competitive.

This is not so in the retail automobile market, however, where prices are individually negotiated and price discrimination is rampant. The market mechanism protects customers who do respond to the price and quality of sound systems, but it does not protect the other buyers who fail to consider autosound systems and thus might pay too much for the car-plus-autosound package. The record in fact shows that many Chrysler purchasers do not compare autosound systems when shopping for cars. So it is at least conceivable that Chrysler's tie-in takes advantage of a market failure due to inadequate consumer information. The real question is whether that consumer protection problem states an antitrust claim. We hold that it does not.

The response of the *antitrust* laws is *caveat emptor:* if car purchasers do not comparison shop, that is their problem, so long as Chrysler is doing nothing to stop them. To use the terminology of *Jefferson Parish*, Chrysler is not *forcing* consumers into taking unwanted goods at inflated prices; it is not foreclosing a choice that would have been made on the merits but for the tie-in. As Justice Stevens wrote for the majority:

> Tying arrangements need only be condemned if they restrain competition on the merits by forcing purchases that would not otherwise be made. A lack of price or quality competition does not create this type of forcing. If consumers lack price consciousness, that fact will not force them to take an anesthesiologist whose services they do not want—their indifference to price will have no impact on their willingness or ability to go to another hospital where they can utilize the services of the anesthesiologist of their choice. Similarly, if consumers cannot evaluate the quality of anesthesiological services, it follows that they are indifferent between certified anesthesiologists even in the absence of a tying arrangement—such an arrangement cannot be said to have foreclosed a choice that would otherwise have been made "on the merits."

466 U.S. at 27-28, 104 S.Ct. at 1565-66. *Jefferson Parish* thus states a general rule that even if a seller's tie-in exploits consumer indifference, such taking advantage of consumer inability or disinclination to compare goods or services does not create an antitrust claim.

The above statement was made in the "per se" portion of *Jefferson Parish*, so perhaps it could be read only to say that such facts do not merit "per se" condemnation. We doubt that, however, because if taking advantage of consumer indifference could state a rule of reason claim, the Court would have noted that in its rule of reason discussion, and it did not. The harm from consumer failure to

consider autosound does not differ meaningfully from the harm caused by consumer failure to consider the size of cars' trunks. Perhaps legislators may wish to protect consumers from themselves, but that is not the task of the antitrust laws. Once again, this kind of injury, which we concede is real, is not "injury of the type the antitrust laws were designed to prevent," *Brunswick*, 429 U.S. at 489, 97 S.Ct. at 697.

3. Difficulty in Making Price Comparisons

The plaintiffs' theory of harm that troubles us most is one that they have pressed only weakly since filing their complaint: according to them, Chrysler's tie-in makes it impossible for *nonlazy* consumers who want to comparison shop for autosound systems to know the sub-price for the sound equipment apart from the rest of the vehicle. When cataloguing the potential harms from tying arrangements in the "per se" section of *Jefferson Parish*, Justice Stevens did suggest that the consumer's "freedom to select the best bargain in the second market is . . . perhaps [impaired] by an inability to evaluate the true cost of either product when they are available only as a package." 466 U.S. at 15, 104 S.Ct. at 1559. In a footnote, he continued: "Especially where market imperfections exist, purchasers may not be fully sensitive to the price or quality implications of a tying arrangement, and hence it may impede competition on the merits." *Id.* at 15 n. 24, 104 S.Ct. at 1560 n. 24, citing Richard Craswell, *Tying Requirements in Competitive Markets: The Consumer Protection Issues*, 62 BU L Rev 661, 675-79 (1982).

But the Court did not have to decide whether a tying arrangement's inducement of such information-related market failures can *by itself* give rise to antitrust liability. In *Jefferson Parish* the plaintiffs offered no "empirical demonstration concerning the effect of the arrangement on price or quality" of anesthesiological services. *Id.* at 30

n. 49, 104 S.Ct. at 1567 n. 49.[30] Here, in contrast, the plaintiffs proffer some evidence of price and quality problems with Chrysler autosound systems. Nonetheless, we hold that antitrust liability does not attach simply because a seller who engages in tying in a competitive market fails to inform consumers of the implicit subprices for each of the two items that it ties.

Because Justice Stevens cited Professor Craswell's insightful article on the economic effects of tying arrangements in competitive markets, we naturally turn to it for guidance. In particular, Justice Stevens cited Professor Craswell's discussion of the problem of "lemons equilibria," 62 BU L Rev at 675-79.[31] Actually, Professor

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[30] In another portion of the opinion, which we discussed in the previous subsection, Justice Stevens did write that "[t]ying arrangements need only be condemned if they restrain competition on the merits by forcing purchases that would not otherwise be made. A lack of price or quality competition does not create this type of forcing." 466 U.S. at 27-28, 104 S.Ct. at 1565-66. Out of context, that statement seems to say that a tying arrangement's inhibition of price and quality competition is not, of itself, an antitrust concern —which is in tension with the passages we have quoted in the text. But the remainder of the discussion there shows that the Court was talking about consumer inability to evaluate anesthesiological services—a preexisting and continuing problem of price and quality competition. The quality of an autosound system is less difficult to judge than the caliber of an anesthesiologist. No doubt Chrysler buyers *can* evaluate the price and quality of autosound systems, although, as the plaintiffs have shown, they often choose not to. The claim here is that the tie-in has *induced* a market failure, not merely taken advantage of an existing one, and *Jefferson Parish* neither rules out nor rules in such claims.

[31] Professor Craswell's article also contains discussions of the problems of surprise and opportunism. 62 BU L Rev at 672-75. His discussion of surprise focuses on the problem of buyer misperception. For example, when a buyer buys a photocopier and commits to purchasing the same manufacturer's paper, the buyer may misestimate the amount of paper that will be needed and hence the cost of the package, or it may simply misunderstand its commitment. Automobile purchases, however, are one-shot deals that re-

Craswell's (and therefore arguably Justice Stevens's) point was *not* that tie-ins make it difficult to compare *prices* of competing goods, which is the plaintiffs' theory. Instead, Professor Craswell noted, "the number and nature of tying requirements that a seller insists on can be viewed as a dimension of the *quality* of that seller's offer," id at 678 (emphasis added), and although "[c]ompetition over price still may keep any seller from earning monopolistic profits, . . . there will be no similar competition to eliminate the tying requirements themselves," id. The result may be one type of lemons equilibrium: "all sellers [will] offer an excessive number of costly tying requirements." Id.

The plaintiffs do not raise Professor Craswell's theory, and even he considered it speculative, see id at 678-79, so we could end there. But we will address the issue of consumers' inability to evaluate the true cost of the car and and the sound system apart from the package because Justice Stevens (and the majority of the Court in *Jefferson Parish*) may have harbored concerns beyond those of Professor Craswell.

As far as we can tell, consumers know what they need to know to evaluate how good a deal they are getting for what they are buying.[32] Surely car buyers know from

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quire no complex estimation of future purchases; their greatest complexity is usually the financing, which is not at issue here. Similarly, Professor Craswell's discussion of opportunism, which focuses on the problem of locked-in buyers, is not applicable here.

[32] Car buyers might want to know the price and dealer cost of each option to determine the dealer's margin, which might help them in bargaining with the dealer. Of course, they would be just as well off knowing the total dealer cost for each car, which they could compare with the total price offered. But neither the antitrust laws (nor, as far as we are aware, consumer protection statutes) require sellers to advise consumers of their mark-ups. At all events, outlawing Chrysler's tying practices would only reveal itemized prices, not itemized costs, which would not help consumers in bargaining.

the sticker price or the salesperson exactly what price they have to pay for what Chrysler car—for the package, including vehicle body, options, and autosound system. And surely they know or could easily find out how much GM, Nissan, Volkswagen, and others are charging for their competitive packages. The packages are comparable, and, indeed, the record indisputably shows that buyers do compare those packages.

Thus we do not have the more typical lemons equilibrium problem of inability to make price comparisons. That concern typically arises in markets where price advertising has been banned, as was traditionally the case in legal, medical, optical, and pharmaceutical markets until those bans were struck down. See Craswell, 62 BU L Rev at 676-77. A patient may have known how much his or her doctor would charge for a particular procedure but found it nearly impossible to find out what *other* doctors would charge; hence price competition was inadequate. As the barrage of television and newspaper advertisements for cars attests, automobile purchasers face no serious hurdles in comparing the price—or, for that matter, most aspects of the quality—of Chrysler car packages to those Chrysler's competitors.

We do not see why the buyer should care whether the underlying prices for a $10,000 car package are $500 for the sound system and $9,500 for the rest of the car, or $1 000 for the sound system and $9,000 for the rest of the car. For antitrust purposes, it makes no difference. If Chrysler's current practice is simply to sell cheap cars and expensive sound systems, that is not an antitrust violation. See *Fortner II*, 429 U.S. at 621-22, 97 S.Ct. at 868-69 (using cheap financing to sell expensive houses may be an unusual credit bargain, but not an antitrust violation).

The plaintiffs evidently believe that if Chrysler's current implicit prices for base vehicle and sound system were $9,000 and $1,000 respectively, and the free market

price for the sound system was $500, then, if the tie-in were outlawed, consumers would react by purchasing a sound system on the aftermarket for $500, a car without sound system for $9,000, and end up paying only $9,500 for a car-plus-sound-system package. But the flaw in that logic is that the price for the rest of the car would not be $9,000. Because the automobile market is competitive, Chrysler is not now achieving supranormal profits overall, although Chrysler might be losing money on the base price of the vehicle and making money on the autosound systems. But if so and the tie-in were banned, Chrysler would no longer be able to cross-subsidize. In order to recover its costs (including the cost of capital), Chrysler would have to raise the base price of the vehicle to $9,500 and consumers would be no better off than before.[33]

All the same, banning Chrysler's tying arrangement would surely compel Chrysler to disclose information to disclose information to consumers that consumers do not now have, so let us assume that potential Chrysler buyers would find *some* utility in knowing the itemized price for Chrysler-installed sound systems. It still would not follow that Chrysler's tying practices have caused antitrust injury.

The antitrust laws were designed to deal with n arkets that are actually or potentially uncompetitive (in the sense of having higher prices and lower quantities pro-

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[33] If the plaintiffs' claim is instead that itemized pricing will spur consumers to consider alternative suppliers for each component, it has two problems. First, it proves too much: the same argument would apply to every component of a car, whether currently denominated an otpion (such as an airbag on most cars) or standard equipment (such as windshield wipers). Second, and more basically, while spurring consumers to comparison shop may be a worthy societal goal, that is not Chrysler's duty under the antitrust laws. Some legislators may want to require itemized pricing for automobiles just as some locales now require unit pricing in supermarkets, but we cannot read such a requirement into the antitrust laws.

duced than in a competitive market). But the market for automobiles (and automobile-plus-sound-system packages) is competitive. The problem that the plaintiffs appear to allege is one of market failure due to imperfect information, which has not been a traditional concern of the antitrust laws. The language of the antitrust laws is probably broad enough to encompass such issues,[34] but for us to hold that the antitrust laws cover such ordinary consumer protection issues would require us to endorse a potentially massive expansion of the scope of the antitrust laws in an era when the Supreme Court has greatly cut back on the scope of antitrust liability. That we decline to do absent a much clearer mandate from the Court.

Moreover, strong institutional considerations counsel against turning the antitrust laws into wide-ranging consumer protection laws. As Professor Craswell himself noted in the article that the *Jefferson Parish* majority repeatedly cited, the appropriate remedy for an information problem is frequently to force disclosure of information, not to prohibit the tie-in or award damages to competitors. See 62 BU L Rev. at 687-96. According to Professor Craswell,

> the antitrust courts clearly are not the ideal institution for addressing the consumer protection issues identified in this Article. Antitrust courts have developed a large body of doctrine over the years to help assess a firm's market power, or to analyze the effects of various types of behavior on competition or on competitors, but they have not developed similar doctrines to help address consumer protection issues. Considerations of consumer information, unfair surprise, or the optimal allocation of risks between buyers and sellers are entirely foreign to antitrust

[34] Actions creating or exacerbating problems of imperfect information could be seen as "restraining trade" or "substantially lessening competition" even though not leading to monopoly or oligopoly.

> law. The same is true of the remedial issues—antitrust courts have never had to wrestle with the difficulties involved in designing an efficient disclosure remedy. Indeed, many of the remedies discussed here could not be imposed by a court entertaining a private antitrust suit against only one or two defendants.

Id at 697.

We agree. We recognize that economic problems resulting from market failures can be severe, and we do not deprecate problems of imperfect information by calling them consumer protection problems. But such problems are likely to be unique to particular industries, and they are best dealt with by a legislative or administrative body. Such a body would be far more capable than an antitrust jury of balancing the costs of information loss against the competitive benefits of a tying arrangement in a competitive market. And even though judges may fashion injunctive remedies under section 16 of the Clayton Act, the remedies sought by competitors (who are usually the plaintiffs) may not be those best for consumers. An agency or a legislative body aided by specialized studies would also have better wherewithal to design an appropriate remedy.

In short, we doubt that Chrysler's tying practices are causing a significant information problem here, but even if they are, the antitrust laws are not the solution and do not provide a cause of action.

4. Foreclosure of the Tied Product Market

The plaintiffs also suggest that Chrysler is foreclosing a substantial portion of the tied product market. As a general proposition, we agree that even if a defendant lacks power in the tying product market, it could conceivably achieve a substantial foreclosure of the tied product market, just as it might by using a requirements

contract involving just one product. That might be the case where the seller of a machine requires that the buyer agree to purchase all its future requirements for a complementary input. In such a case, the concern is not so much with the *tie* between the two products, but with the *tying up* of sales in the tied product market, which is the issue in exclusive dealings cases, which are evaluated under the rule of reason anyway. See 9 Areeda, *Antitrust Law* ¶ 1728d at 372.

That theory makes no sense on the facts of this case, however. Because the theory is one of market foreclosure, we must examine the structure of the market supposedly foreclosed.[35] In this case, the plaintiffs define the tied product market as autosound products for new Chrysler cars and contend that Chrysler has foreclosed competitors from virtually all of that market. But, as we explained at 478 [Part II.B], that manner of market definition is improper. The tied product market also includes all sound systems with which Chrysler-installed sound systems compete.

Certainly the manufacturers of autosound systems for the aftermarket compete with Chrysler, for if they did not, these plaintiffs could not have claimed to suffer any injury. Moreover, the sound systems installed by other automobile manufacturers compete with Chrysler via the competitive market for automobiles. If Ford, for example, offered a free top-of-the-line sound system with every subcompact car it sold, surely that sales pitch would affect the demand for Chrysler cars and hence Chrysler-installed

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[35] Chrysler has conceded that its practices affect a substantial amount of commerce. We do not read that concession, however, as an acknowledgement that Chrysler has foreclosed such a substantial portion of the tied product market to hurt competition. Chrysler's briefs vigorously deny that it has power in a properly defined tied product market, and Chrysler submits that as a result there is no way that it could appreciably restrain competition in that market.

autosound systems.[36] Chrysler certainly views itself as being in competition with Ford- and GM-manufactured autosound systems (presumably Sony, Blaupunkt, and other independent autosound manufacturers do as well). Indeed, the plaintiffs' own submissions show that Chrysler dealers have been concerned over the competitiveness of certain Chrysler-installed sound systems against the sound systems available on other cars. If Chrysler-installed sound systems did not compete with GM's, Ford's, Toyota's, etc., the dealers would not have complained. That Chrysler now buys some autosound systems from other manufacturers rather than producing all its own (as it used to) may also indicate that Chrysler is not insulated from competition in the autosound market.[37]

The plaintiffs do proffer an affidavit from their expert, Professor Adams, in support of their definition of the tied product market. Professor Adams's affidavit offers his opinion that "the relevant market properly examined in this case is the market for autosound equipment for installation in new Chrysler vehicles, and . . . Chrysler possesses market power in that market." As grounds for

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[36] That not all Ford and GM sound systems may physically fit into Chrysler dashboard slots is irrelevant to the process of market definition. The real question is whether the system compete with each other. For someone who has already decided to buy a Chrysler, it is true that a Ford-installed sound system may not compete with a Chrysler- or aftermarket-supplied sound system because the Ford system would be too big to fit. But the question of fit only matters if automobile buyers are locked into buying Chryslers, which is simply not true.

[37] The plaintiffs argue that Chrysler's practice is motivated by its greater profits on sound systems that it manufactures itself. Even if we assume that this is true (which is by no means obvious as a matter of economic theory), if Chrysler also were totally insulated from competition with respect to autosound systems, it would make no sense for Chrysler to continue to purchase any sound systems from other manufacturers. Thus one or both of the plaintiffs' two premises must be false.

his opinion, he cited the consumer surveys and statements by Chrysler dealers that we mentioned above. We do not think that Professor Adams's affidavit raises questions different from the market failure questions discussed in the previous two subsections. His affidavit does not controvert the fact that sound systems installed in non-Chrysler cars are actual or potential competitors of sound systems in Chrysler cars. A small fraction of consumers may have their hearts set on Chrysler cars, and some others may not care about autosound systems when they buy their cars. But for those who do consider autosound systems (the consumers about whose interests the antitrust laws are concerned) all manufacturers' sound systems compete and are therefore in the same market.

We therefore believe that the district court properly defined the tied product market to include all autosound systems sold in the United States.[38] Chrysler controls well under ten percent of the tied product market as thus defined. Even if Chrysler were to install sound systems on every car it sells, we see no reasonable possibility that Chrysler could establish a dominant position over the autosound market when Chrysler cars comprise only a tenth of the American automobile market.[39] Therefore, to the extent that the plaintiffs' rule of reason claim rests

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[38] At all events, the plaintiffs, not Chrysler, bear the burden of defining a relevant tied product market for purposes of this theory. Even if we were to agree that Chrysler's broad definition of the tied product market was disputable, certainly the plaintiffs are not entitled to go to trial with their Chrysler-only definition of the tied product market. The plaintiffs' definition is patently invalid.

[39] The plaintiffs requested but did not obtain discovery of the profitability of Chrysler's autosound sales, information which would be relevant to Chrysler's ability to sustain supranormal profits from autosound sales (that is, power in the autosound market). Once again, however, if the plaintiffs felt that this discovery was necessary for them to defeat Chrysler's motion for summary judgment, it was incumbent on them to file a Rule 56(f) affidavit. They did not do so, and therefore cannot complain now. See *Dowling v. City of Philadelphia*, 855 F.2d 136, 139-40 (3d Cir 1988).

on a theory of foreclosure of the tied product market, it does not raise a triable issue of fact.[40]

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[40] The plaintiffs have also asked that this court take notice that Chrysler's practice of standardizing autosound systems is becoming prevalent across the automotive industry. That standardization, they suggest, will ultimately doom the entire autosound aftermarket industry because aftermarket sellers will not enter the automobile market in order to sell their audio wares. Chrysler has admitted that Ford and GM are undertaking similar standardization programs. The Big Three American automakers, however, only account for about half of the American automobile market. Asian and European manufacturers have made large inroads into the American car market, and the plaintiffs have not introduced into the record any information about foreign manufacturers' practices.

We do not believe that this is the type of fact of which federal courts may take judicial notice under Federal Rule of Evidence 201(b). Actually, Chrsyler suggested at oral argument that the foreign manufacturers are not following the American practice. But this fact is not generally known and we have not independently confirmed it, nor could we easily do so. Whatever the truth may be, we cannot credit the plaintiffs' arguments to the extent that they are based on industry-wide practices.

Moreover, even if we assumed that soon *every* automobile manufacturer will include an autosound system on *every* car, the most that we could conclude would be that a certain class of competitors (namely the autosound aftermarket dealers) might be doomed to competitive oblivion. But that would be no concern of the antitrust laws unless consumers were also hurt because of diminished competition. See *Brunswick*, 429 U.S. at 488, 97 S.Ct. at 697 (antitrust laws serve to protect competition, not competitors). If the autosound aftermarket were to disappear, vigorous competition in the automobile market would remain. That competition would protect those consumers who care about autosound systems no less than it now protects consumers who care about other standard features, including the comfort of the front seats, the quality of the brakes, and the fuel efficiency of the engine.

If the plaintiffs alleged actual or tacit collusion among automobile manufacturers with respect to standardization, that would be a serious antitrust concern. But the plaintiffs do not. If the autosound aftermarket industry wants protection from auto manufacturers' supposedly widening yet noncollusive standardization practices, it should seek relief from the Congress, not from the federal courts whose duty it is to adjudicate antitrust claims.

C. *Summary*

To survive summary judgment on their rule of reason claim under the Sherman Act, the plaintiffs do not have to show that Chrysler has economic power in the automobile market, at least as the law now stands. But they do have to show injury, not simply to themselves but of the type that the antitrust laws were designed to prevent. *Brunswick*, 429 U.S. at 489, 97 S.Ct. at 697. Antitrust injury means injury to competition. *Id.* at 488, 97 S.Ct. at 697. Here the plaintiffs offer no evidence that Chrysler has impeded the market mechanism from punishing it if it tries to sell inferior and overpriced autosound systems. The competitive automobile market protects consumers from having to pay too much for autosound systems just as much as it prevents consumers from having to pay too much for tires and other standard equipment on cars. No doubt the plaintiffs' businesses have suffered, but that is not by itself an antitrust problem. If competition in the autosound market is suffering, that is only because some consumers are choosing not to exercise their right to compare competing products, and protecting consumers from themselves is not the goal of the antitrust laws. Because the plaintiffs allege no plausible theory of antitrust injury, we will affirm the district court's grant of summary judgment on the rule of reason claim.

IV. LIABILITY UNDER SECTION 3 OF THE CLAYTON ACT

Finally, the plaintiffs submit that even if they have no claim under the Sherman Act, then at least they have a claim under section 3 of the Clayton Act, which, they say, proscribes more conduct than the Sherman Act. In support, the plaintiffs cite dictum in *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 73 S.Ct. 872, 97 L.Ed. 1277 (1953), where the majority opinion stated:

> When the seller enjoys a monopolistic position in the market for the "tying" product, *or* if a substantial

> volume of commerce in the "tied" product is restrained, a tying arrangement violates the narrower standards expressed in § 3 of the Clayton Act because from either factor the potential lessening of competition is inferred. And because for even a lawful monopolist it is "unreasonable, *per se*, to foreclose competitors from any substantial market", a tying arrangement is banned by § 1 of the Sherman Act whenever *both* conditions are met.

345 U.S. at 608-09, 73 S.Ct. at 880 (emphasis in the original).[41] Actually, the plaintiffs only cite this language in support of their belief that antitrust liability for a tie-in can exist absent power in the tying product market, a position with which we have already agreed. But the quoted language does suggest that the Clayton Act generally has a weaker standard for liability, so we will address that more general issue. We hold that even if the standards of liability under the two acts have not coalesced since 1953,[42] the plaintiffs do not raise a triable Clayton Act claim.

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[41] The language in *Times-Picayune*, although part of an extended discussion, is doubly dictum because (1) the case did not involve a claim under section 3 of the Clayton Act, and (2) the decision turned on whether the morning and afternoon newspapers were one product, hence whether there was a tie-in at all. Because the Court has never stated this position in a holding, technically it does not bind us. Generally, however, we consider and respect Supreme Court dicta as well as holdings because the Supreme Court hears relatively few cases and frequently uses dicta to give guidance to the lower courts. Of course, at the time of *Times-Picayune*, antitrust cases were directly appealable to the Supreme Court, so perhaps we could dismiss the language as "mere" dictum, but it was carefully considered dictum and we prefer to tackle the plaintiffs' argument head on and not dispose of it on that tenuous ground.

[42] Actually, the dual-standard position that the Court endorsed in *Times-Picayune* may not have survived the intervening years. The Court has not faced a claim under section 3 of the Clayton Act since *Times-Picayune*, so not surprisingly it has not explicitly either reaffirmed or backed off from the language at issue. Never-

These plaintiffs have no Clayton Act claim because the effect of Chrysler's actions is not and will not be "to substantially lessen competition or tend to create a monopoly" in the autosound market, as section 3 of the Clayton Act requires.[43] At best the statutory language suggests that the Clayton Act may reach conduct that will eventually become illegal under the Sherman Act at an earlier stage—in its incipiency. For the same reasons discussed in our evaluation of the plaintiffs' Sherman Act claims, however, Chrysler's practice of making autosound systems standard equipment on its cars is not now causing, and is not likely in the future to cause, injury of the sort that the antitrust laws were intended to prevent. Chrysler therefore is entitled to summary judgment that it has not violated section 3 of the Clayton Act.

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theless, we are inclined to agree with Professor Areeda, among others, that the standards for illegality of tying arrangement under the Sherman and Clayton Acts have coalesced. See 9 Areeda, *Antitrust law* ¶ 1719b at 254-57 (citing cases and noting arguments for differing standards based on precedent, legislative history, and general principles of statutory interpretation, but persuasively rejecting each). See also 2 Areeda and Turner, *Antitrust Law* ¶ 304 at 6-9.

[43] The plaintiffs rely heavily on the legislative history of the Clayton Act, but the legislative history of that act is a complicated one. See 2 & 3 Earl W. Kintner, ed, *The Legislative History of the Federal Antitrust Laws and Related Statutes* (Clark Boardman, 1978). Some members of Congress sought to clarify and expand the scope of antitrust liability under the Sherman Act, which was murky after the promulgation of the rule of reason in *Standard Oil Co. v. United States*, 221 U.S. 1, 31 S.Ct. 502, 55 L.Ed. 619 (1911). Others sought to rein in their colleagues by insisting on the qualifier requiring a substantial lessening of competition or the tendency to create a monopoly. Because one can find choice statements in the voluminous legislative history of this statute to support almost any interpretation, we prefer to focus on the compromise language eventually hammered out.

V. CONCLUSION

Because Chrysler lacks market power in the tying product market (the market for automobiles sold in the United States), the plaintiffs cannot succeed on their "per se" claim, or on a rule of reason claim based on leveraging of market power. Because the plaintiffs do not offer any other plausible and cognizable theory of causation of antitrust injury, the plaintiffs raise no other triable rule of reason claim. Because the plaintiffs offer no better evidence of incipient antitrust injury than of current antitrust injury, their Clayton Act claim must fail as well. Accordingly, the summary judgment of the district court will be affirmed.

SLOVITER, Chief Judge, concurring and dissenting, with whom Judge MANSMANN joins.

I.

Tying As A Per Se Violation

The majority's clear explication of tying doctrine is persuasive insofar as it covers *per se* antitrust liability. I agree with its view, which is consistent with that of the original panel, that plaintiffs failed to produce sufficient evidence to withstand summary judgment on the *per se* theory of liability.

The dual anticompetitive effects from tying which the Supreme Court has recognized, i.e., the harm that such arrangements may cause competitors of the seller of the tied product, *see Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 13 n. 19, 104 S.Ct. 1551, 1558 n. 19, 80 L.Ed.2d 2 (1984), and the injury to consumers of the tied product, *see, e.g., id.* at 15, 104 S.Ct. at 1559, cannot be presumed in this case because plaintiffs have failed to make any showing that Chrysler held market power in the tying product. Although plaintiffs are correct that the scope of the relevant market may be a question of fact for jury resolution, *see Weiss v. York Hosp.*, 745 F.2d 786, 825 (3d Cir.1984), *cert. denied*, 470 U.S. 1060, 105 S.Ct. 1777, 84 L.Ed.2d 836 (1985); *Columbia Metal Culvert Co. v. Kaiser Aluminum & Chem. Corp.*, 579 F.2d 20, 28 (3d Cir.), *cert. denied*, 439 U.S. 876, 99 S.Ct. 214, 58 L.Ed.2d 190 (1978), in this case they have failed to create a material factual dispute to support their contention that a properly defined market includes only Chrysler automobiles. The affidavits submitted by Chrysler as well as reports of Chrysler dealer meetings evidencing that the Chrysler dealers perceive themselves as competing with dealers handling other cars with respect to price, features, quality, comfort, warranties, financing and other terms, were not effectively rebutted.

The position of the majority is amply supported by the available precedent. *See Kingsport Motors, Inc. v. Chrysler Motors Corp.*, 644 F.2d 566, 571 (6th Cir.1981) (relevant market consists of sum total of medium-priced automobiles manufactured by Chrysler and all other automobile manufacturers and sold in the United States); *Merit Motors, Inc. v. Chrysler Corp.*, 417 F.Supp. 263, 269 (D.D.C.1976) ("Automobiles are more or less interchangeable items, and the price of one brand affects the demand for other brands. Hence, it is clear that the relevant market . . . cannot be limited to the sale of one brand of automobile, but must include the fleet market for all brands of automobiles." (citation and footnote omitted)), *aff'd*, 569 F.2d 666 (D.C.Cir.1977); *see also R.D. Imports Ryno Indus. v. Mazda Distribs. (Gulf), Inc.*, 807 F.2d 1222, 1225 n. 2 (5th Cir.) (market not limited to Mazdas because "Mazda vehicles had a variety of domestic and foreign substitutes"), *cert. denied*, 484 U.S. 818, 108 S.Ct. 75, 98 L.Ed.2d 38 (1987); *Packard Motor Car Co. v. Webster Motor Car Co.*, 243 F.2d 418, 420 (D.C.Cir.) (other cars are " 'reasonably interchangeable by consumers for the same purposes' as Packard cars" and are therefore in competition with Packard cars), *cert. denied*, 355 U.S. 822, 78 S.Ct. 29, 2 L.Ed.2d 38 (1957); *Mogul v. General Motors Corp.*, 391 F.Supp. 1305, 1313 (E.D.Pa.1975) (market not limited to Cadillacs), *aff'd mem.*, 527 F.2d 645 (3d Cir.1976). I thus agree with the majority that the district court properly rejected the plaintiffs' *per se* theory.

II.

Rule of Reason Inquiry

I also agree with the majority's rejection of Chrysler's contention that the absence of market dominance in the tying market precludes any rule of reason inquiry, and see no need to repeat the authorities upon which it relies

for that proposition. Regrettably, my agreement with the majority stops at that point.

Initially, I note that the majority's holding necessarily undercuts the basis for the district court's grant of summary judgment on plaintiffs' rule of reason claim. The district court had interpreted *Jefferson Parish* to require a plaintiff to prove that the defendant has market power in both the tying and tied product markets. It followed for the district court that because it found that Chrysler had a ten to twelve percent share of all automobiles sold in the United States and a three to seven percent share of the market for automotive sound equipment sold in the United States for installation in automobiles, plaintiffs' rule of reason claim failed and the court saw no need to look at the effect of Chrysler's tying practices.

The majority concedes that the district court's legal premise is erroneous. As the majority implicitly recognizes, under the district court's approach where both tests have identical market power requirements, the rule of reason analysis would be collapsed into the *per se* test. Although the four concurring Justices in *Jefferson Parish* advocated only a single analysis in tying cases, even they did not suggest accomplishing that by abrogating the rule of reason analysis; rather they sought to abolish the *per se* test. *See Jefferson Parish*, 466 U.S. at 35, 104 S.Ct. at 1569 (O'Connor, J., concurring).

Under ordinary circumstances, when we hold that the district court granted summary judgment based on an erroneous view of the law, we remand for further proceedings unless the result reached by the district court can be otherwise sustained as a matter of law. Presumably acting under this exception, the majority upholds the summary judgment in this case, but the reasons on which it does so were neither the focus of Chrysler's motion for summary judgment nor were they even considered by the District Court. Although Chrysler's summary judgment submissions contained some allusions to the material seized upon by the majority, these peripheral

references hardly supplant the need to give plaintiffs an opportunity to respond to the issue of causation of antitrust injury which is the basis of the majority's holding. *See* 10A Charles A. Wright et al., *Federal Practice and Procedure* § 2725 (1983) ("the court normally should give the parties notice when it intends to rely on a legal doctrine or precedents other than those briefed and argued by the litigants").

It is simply unfair for the majority to chastise plaintiffs for failing to file a motion under Rule 56(f) if they believed that they had not "ample discovery to determine precisely *how Chrysler's challenged practices are hurting them*," Majority Op. at 487 n. 25 (emphasis added), when the *only* basis urged in Chrysler's summary judgment motion was that "Chrysler indisputably lacks the economic power in any relevant market needed to establish a tying violation." App. at 415. Chrysler did not claim lack of antitrust injury, at least at this stage, and the briefs on appeal are not directed to that issue. Thus, even if I did not disagree with the majority in the almost insurmountable obstacles it imposes on antitrust plaintiffs in tying cases, I would disagree with the procedure it follows in this case.

My principal disagreement with the majority is more fundamental and goes to the essence of a rule of reason inquiry. It has long been understood that the rule of reason focuses directly on the challenged restraint's impact on competitive conditions and requires the court to examine the purpose[1] and effects of an allegedly anticompetitive practice to determine whether the general

[1] The majority focuses on the effects rather than the purpose of Chrysler's tie, although there is evidence that suggests that Chrysler was targeting its competitors in the aftermarket installation. An internal Chrysler memorandum in 1983 by a departmental specialist to the manager of Options and Mix Merchandising stated, "[w]e will support product planning's proposal to make radios standard on everything. . . . Our field force should have ample reason to *force our radios in place of aftermarket installations*." App. at 301 (emphasis added).

standards of the antitrust laws have been violated. *See Fortner Enters. v. United States Steel Corp.*, 394 U.S. 495, 500, 89 S.Ct. 1252, 1257, 22 L.Ed.2d 495 (1969) [hereinafter *Fortner I*].

In the absence of any proffer by the plaintiffs as to the causation of antitrust injury issue that the majority finds dispositive, the majority is thus left to attempt to "discern" several theories of harm that it believes plaintiffs would proffer. I am unpersuaded by the majority's purported demolition of each of them.

It is plaintiffs' principal theory that Chrysler's tie of autosound equipment to its automobiles was in fact causing the destruction of the autosound aftermarket, which plaintiffs contend has been the source of technological innovation. Plaintiffs thus posit both injury to and the potential destruction of the class of independent autosound equipment dealers, including themselves, as well as injury at the consumer level.

The majority gives little attention to the possibility of anticompetitive effect through injury to or elimination of a class of independent autosound dealers. Accepting the majority's position that the tied product market includes all autosound systems sold in the United States, Chrysler's tie forecloses from the independents 10% of the market for autosound equipment installed in new cars. This amount itself could have anticompetitive effects. But the effect of the practice is even greater. Because Chrysler has admitted that Ford and GM are undertaking similar tying arrangements, the majority is obliged to concede that at least 50% of the market for autosound equipment in new cars may be foreclosed. *See* Majority Op. at 494-495 n. 40.

In fact, Chrysler probably understated the share of the market represented by the American automakers. According to industry statistics, the Big Three American auto manufacturers accounted for almost two-thirds of domestic car sales in 1990. *Ward's Automotive Yearbook*

208 (1991). In 1984, the first year of the tying practice at issue, the Big Three accounted for just under three-quarters of all domestic car sales. *See id.* (appearing in App. at 124). If this tying practice were adopted industry-wide,[2] it would have the potential to foreclose almost entirely the aftermarket for autosound systems because the demand for the tied product (autosound systems) is derivative of that for the tying product (automobiles).[3]

The anticompetitive effect of such rippling practices is evident. As Areeda has observed:

> Though it individually forecloses only a modest portion of the tied market, a particular seller's tie-in might be one of several. The cumulative impact of these several ties could then be substantial, and it is that cumulative impact that [indicates] whether tie-ins can create or reinforce concentration in the tied market, create a barrier to entry, or facilitate tacit coordination in the tied market.

9 Phillip E. Areeda, *Antitrust Law* ¶ 1709d2, at 103-04 (1991).

I find disturbing the majority's remarkable statement that even if all automobile manufacturers tied autosound equipment to the car and, as a result, "a certain class

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[2] The majority appears to credit Chrysler's suggestion made at oral argument that the foreign manufacturers are not following the American tying practice. *See* Majority Op. at 494-495 n. 40. If the majority had permitted this case to proceed to an inquiry into actual competitive effects, it might have been relatively easy for plaintiffs to establish that, in fact, many of Chrysler's foreign competitors are engaging in similar tying practices. *See, e.g.*, Five Compacts Sedans, *Consumer Reps.*, March 1990, at 199 (noting that Honda Accord LX, Nissan Stanza GXE, and Subaru Legacy LS all include stereos as standard equipment).

[3] The interconnection between demand for the tying product and the tied products is one of the distinguishing factors between this situation and the flour/sugar hypothetical discussed in *Jefferson Parish*, 466 U.S. at 12, 104 S.Ct. at 1558, where the demand for the two goods is independently derived.

of competitors (namely the autosound aftermarket dealers) might be doomed to competitive oblivion . . . that would be no concern of the antitrust laws unless consumers were also hurt because of diminished competition." Majority Op. at 495 n. 40. In contrast to the majority, I believe that if the "doom" of independent dealers is precipitated by a practice prohibited by the antitrust laws, then the effect is injury cognizable under those laws.

I believe that underlying the majority's position is a serious misinterpretation of the Supreme Court's statement that "[t]he antitrust laws . . . were enacted for 'the protection of *competition*, not *competitors*.'" *See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488, 97 S.Ct. 690, 697, 50 L.Ed.2d 701 (1977). In *Brunswick*, three small bowling centers claimed that the nation's largest operator of bowling centers violated section 7 of the Clayton Act by acquiring several failing bowling centers that competed with plaintiffs. The Court held that the jury verdict for plaintiffs could not be sustained because the damage theory posited by the plaintiffs, *i.e.*, that plaintiffs were injured because the mergers *preserved* their bowling alley competitors who would have closed but for the mergers, was not "injury of the type the antitrust laws were intended to prevent." *Id.* at 489, 97 S.Ct. at 697. Thus, it was in a case where the challenged conduct led to the continued existence of competitors, not their potential destruction, that the Court made the now famous statement that "[t]he antitrust laws . . . were enacted for 'the protection of *competition*, not *competitors*.'" *Id.* at 488, 97 S.Ct. at 697. I see nothing in *Brunswick* that suggests that a tying arrangement that makes it difficult, if not impossible, for a class of independent competitors to compete does not cause antitrust injury.

The other Supreme Court case cited by the majority in this connection, *Cargill, Inc. v. Monfort of Colorado, Inc.*,

479 U.S. 104, 107 S.Ct. 484, 93 L.Ed.2d 427 (1986), also does not support the majority's construction of antitrust injury. In *Cargill*, the Court held that an integrated beef packing company could not enjoin the merger of two large packers because the plaintiff's loss of profits from the need to lower its prices to remain competitive was not antitrust injury. As the Court explained, just as the losses in *Brunswick* from continued competition did not constitute antitrust injury, neither did losses from increased competition. *Id.* at 116, 107 S.Ct. at 492. Thus, the loss of an individual competitor might not be cognizable injury to competition when it results from fair competition.

However, the *Cargill* Court certainly did not imply that injury to competitors from predatory practices would not be cognizable. *See Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 213, 79 S.Ct. 705, 709, 3 L.Ed.2d 741 (1958). In fact, the *Cargill* Court's rejection of an invitation to deny competitors standing to challenge acquisitions demonstrated that the viability of competitors remains an antitrust concern. 479 U.S. at 120-21, 107 S.Ct. at 494-95. As far as I know, the statement in *International Salt Co. v. United States*, 332 U.S. 392, 396, 68 S.Ct. 12, 15, 92 L.Ed. 20 (1947), a tying case, that "it is unreasonable, *per se*, to foreclose competitors from any substantial market," remains good law. *See* Eleanor M. Fox, *The Modernization of Antitrust: A New Equilibrium*, 66 Cornell L.Rev. 1140, 1153-54 (1981) ("Interests of entrepreneurs and small business have been a recurrent concern because independent entrepreneurs have been seen as the heart and lifeblood of American free enterprise, and freedom of economic activity and opportunity has been thought central to the preservation of the American free enterprise system.").

Nor is there anything in *Jefferson Parish* to the contrary. Although the Court in that case focused on the effect on patients of the hospital's exclusive contract for

anesthesiological services with one doctors' group, the Court did not suggest there could never be antitrust injury to competitors in the tied market. To the contrary, the Court noted that one of the effects of a tie could be impairment of competition on the merits in the market for a tied product which could "harm *existing competitors* or create varirers to entry of new competitors in the market for the tied product." 466 U.S. at 14, 104 S.Ct. at 1558 (emphasis added); *see also id.* at 13 n. 19, 104 S.Ct. at 1558 n. 19 ("'the practice of tying forecloses other sellers of the tied product and makes it more difficult for new firms to enter that market'" (quoting *Fortner I*, 394 U.S. at 513, 89 S.Ct. at 1263 (White, J., dissenting))).

I, therefore, believe that the majority errs in failing to accept that injury to a class of independent autosound dealers and destruction of the autosound aftermarket can constitute antitrust injury. The evidence of the share of the tied market foreclosed by the tying practices condoned by the majority is sufficient to permit a jury to find such antitrust injury.

Nor do I agree with the majority that as a matter of law the Chrysler tying arrangement could not cause injury to consumers of a type cognizable under the antitrust laws. To the contrary, elimination of independent autosound dealers necessarily adversely affects consumers for the tied product. *See* 9 Phillip E. Areeda, *Antitrust Law* ¶ 1705b, at 65 (1991) ("[t]he disappearance of rival firms in the tied market . . . eliminates competitive spurs toward cost reduction, innovation, and improvements in the production and distribution of that product.").[4]

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[4] Similarly, foreclosure of part of the market occupied by independents also may injure consumers in their pocketbooks. As a general matter, in an oligopolistic market "ties narrowing the volume of orders potentially available to rivals lower their possible gains from price cutting. In turn, reducing their incentive for

The majority's conclusion that there will be no anti-competitive effect of the tie on the consumer level is based entirely on its view that competition in the *automobile market* adequately "protects consumers from having to pay too much for autosound systems," Majority Op. at 495. This, in turn, is based on two premises: one, that the automobile market is competitive, *see, e.g., id.* at 492, and the other, that it is to the advantage of automobile manufacturers to compete with each other as to autosound equipment. I believe that neither premise is established as a matter of law on this record, which is what the majority's affirmance of summary judgment signifies.

It simply is not evident, as the majority assumes, that the automobile market is competitive. Industry statistics reveal that only six car companies (GM, Ford, Chrysler, Honda, Toyota, and Nissan) accounted for almost 90% of the cars sold in the United States in 1990. *See Ward's Automotive Yearbook* 207 (1991). These numbers are not characteristic of competition, but of oligopoly.

I agree with the majority that if the automobile market operated like the hypothetical competitive market, we could expect that some sellers of automobiles might seek to compete by lowering price or increasing the quality of the autosound equipment offered in their cars. Neither the academic economists relied on by the majority, nor the economic theories that it discusses, are needed to recognize that the competition that exists among automobile manufacturers is imperfect, and that such competition that does exist is generally directed toward more dominant features than autosound equipment, such as style, price and even safety features. How many of the Super

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price competition diminishes its likelihood, thereby helping stabilize non-competitive oligopoly pricing." 9 Phillip E. Areeda, *Antitrust Law* ¶ 1707c, at 80-81 (1991). Thus, such a tying practice may also discourage aftermarket sellers from engaging in vigorous price competition (an anticompetitive effect).

Bowl automobile commercials were devoted to the automobile's CD sound?

In light of the small number of competitors, it is at least likely that the automobile market may be operating in an oligopolistic fashion. As Areeda, on whom the majority frequently relies, observes: tacit coordination among sellers may occur "among as many as eight or twelve significant firms in a market." 9 Phillip E. Areeda, *Antitrust Law* ¶ 1704c, at 59 (1991). The automobile market is even more concentrated.

In an oligopolistic market, the leading players can follow the behavior of their counterparts without any direct contact. There is some possibility that occurred as to the tying arrangements of autosound equipment. The 1986 Chrysler Sound System Distribution Proposal states:

> G.M. and Ford both feature successful radio programs. Coordinated efforts between Production, Electronics Division and Parts Division have effectively blocked Audiovox "look-alike" sales. In fact, their success has caused Audiovox to concentrate its efforts on Chrysler. G.M. and Ford dealers are locked in to original equipment radios through high factory radio installation rates and efficient upgrade programs.

App. at 891. One of the goals listed in the Chrysler memorandum was "[i]ntegration of sound systems with vehicle design to *obstruct aftermarket competitors*." *Id.* at 902 (emphasis added).

There are plausible business explanations why, in an oligopolistic market, automobile manufacturers would choose to abstain from competing against each other by giving their auto buyers freedom of choice of automotive systems. *Cf. Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 589-90, 106 S.Ct. 1348, 1357-58, 89 L.Ed.2d 538 (1986). There is evidence that the profit margin on the sale and installation of car radios by independents was as high as eighty-five percent. App. at

141. Thus, if each manufacturer included its own sound system as a standard feature in the automobiles it sold, each would reap the high profit and be insulated from competition with independent retailers and installers on the basis of price, service, or quality.[5] *See* Phillip Areeda & Louis Kaplow, *Antitrust Analysis* ¶ 232, at 278 (1988) ("even without direct communication, such firms may be able to reach and maintain the monopoly price through such mutual coordination by observing each other in the marketplace and acting consistently with the group interest").

Moreover, the majority appears to discount the effect of the tying arrangement in limiting consumer choice of autosound equipment.[6] The fact that particular consumers may be uninformed or lazy, as the majority posits, does not forfeit their statutory right to buy in a market which is free of artificial obstacles. Only if competition were dysfunctional or Chrysler in fact had some leverage could one explain the evidence that the radios Chrysler supplied were, as viewed by their own dealers, of poor quality and overpriced. *See* App. at 298 (dealers at a council meeting in Cincinnati in September 1987 complained that "[r]adios are extremely overpriced"); *id.* at 295 (internal Chrysler memorandum dated May 6, 1987 that the dealers "are convinced that the higher the cost of a Chrysler radio, the lower the quality of the radio"); *id.* at 303 (52% of Chrysler dealers surveyed January

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[5] Although the majority does not accept plaintiffs' argument that the district court erred in failing to require Chrysler to produce documents relating to the profitability of its radio sales, I would not discount the relationship of such evidence to an inquiry into effect on competition in the tied product market.

[6] A consumer survey presented by plaintiffs reported that 13.4 percent of Chrysler buyers would have preferred to choose a different brand or type of radio than that supplied with their cars, App. at 579, and 20.8 percent would have preferred to have had the option to purchase a car without its accompanying automotive sound equipment, *id.* at 584.

1984 when delete option still available would have ordered more Chrysler factory radios if they were more price competitive).

Chrysler's ability to force what may have been or is an inferior or overpriced autosound system on its car buyers need not have come solely from market dominance. To most car purchasers, the autosound system is viewed as a small and relatively inexpensive component of the total car purchase. In economic terms, the demand for autosound systems may be highly inelastic.[7] If that is proven, then it is illusory for the majority to conclude that competition at the automobile level will ensure competition in the autosound product market.

I find it anomalous that although the majority states that a rule of reason claim does not require an inquiry into market power in the tying product market, the result it reaches under the rubric of absence of antitrust injury stems from its conclusion that Chrysler does not have such market power ("[W]here a defendant indis-

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[7] It is significant that unlike flour and sugar, items of relatively equal value, there is evidence in this case that the typical consumer has already decided to purchase a particular brand of automobile, a major decision, before considering the relatively minor decision regarding preferences as to a car radio. There is evidence that only 1.6% of the Chrysler buyers decided not to buy a particular car because the desired automotive sound equipment was not available. The figure for buyers of cars generally was 2.4%. App. at 581. This court has previously expressed concern that a minor decision may be insulated from the competitive pressures of the marketplace due to the nature of an accompanying major decision and the order in which the decisions are typically made by consumers. *See Weiss*, 745 F.2d at 826 (jury could reasonably have concluded that a consumer of hospital services makes one purchase decision and that further decisions concerning his treatment are relatively insulated from competition). Thus, the normal market pressures from competition, which are expected when one sells independent products together, such as flour and sugar, and which, at least theoretically, protect against monopoly profits and inferior products, may not be operating in the tied product market here.

putably proves that it lacks sufficient power in the tying product market, a plaintiff's power leveraging claim, whether packaged in 'per se' or rule of reason terms, falls apart." Majority Op. at 486. In effect, the majority ultimately restores, as a prerequisite for a successful tying case, precisely the market power showing it initially eschewed.

Unlike the majority, I am not prepared to discount the possibility that plaintiffs can produce evidence that, if credited by a jury, would show that Chrysler's tie of radios to the purchase of Chrysler cars caused the two principal effects which the Supreme Court identified in *Times-Picayune* as the harms from tying arrangements, *i.e.*, the inhibition of buyers from making their preferred purchase choice on the merits and the exclusion of competing sellers from the tied product market. *See Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 605, 73 S.Ct. 872, 878, 97 L.Ed. 1277 (1953).

It has not been lost on me that some economists and antitrust academicians have been pressing for a different approach to tying arrangements than that which has been followed heretofore. Although I believe that economic analysis has a useful role to play in assisting the courts in understanding the realities of the marketplace, we cannot allow economic theory to replace the function traditionally allocated to the trier of fact in cases governed by the rule of reason.

For example, while the article authored by Professor Richard Craswell, Tying Requirements in Competitive Markets: The Consumer Protection Issues, 62 B.U.L.Rev. 661 (1982) [hereinafter Craswell, Tying Requirements], may be "insightful," I am unwilling to assume that because it was cited in *Jefferson Parish* (one of many), his theories have the imprimatur of the majority of the Supreme Court. *See* Majority Op. at 491. The thesis of Craswell's article is "that most tie-in controversies could be addressed far more effectively *if they were removed*

from the penumbra of the antitrust laws entirely." Craswell, Tying Requirements, 62 B.U. L.Rev. at 663 (emphasis added). I see nothing in the majority's opinion in *Jefferson Parish* which endorses that view.

It is Congress which has placed tying "within the penumbra of the antitrust laws," and indeed did so quite explicitly and emphatically through its enactment of section 3 of the Clayton Act. Because I believe that the majority, through its interpretation of a causation of antitrust injury test, has effectively enacted Craswell's thesis into the law of this circuit, I respectfully dissent.

APPENDIX B

U.S. COURT OF APPEALS
THIRD CIRCUIT

No. 90-1547

TOWN SOUND AND CUSTOM TOPS, INC., SUBURBAN AUTO SOUND & COMMUNICATIONS, INC., NORTHEAST ELECTRONICS SUPPLY, INC. and DOMINION RADIO SUPPLY, INC., on behalf of themselves and all others similarly situated

v.

CHRYSLER MOTORS CORP.

Filed August 9, 1991

Appeal from U.S. District Court,
Eastern District of Pennsylvania

For appellants: Donald B. Lewis (argued), and Ann Miller, Law Offices of Donald B. Lewis, Philadelphia, Pa.
For appellees: Joseph Angland (argued), and Robin D. Adelstein, of Dewey, Ballantine, Bushby, Palmer & Wood, New York, N.Y.

Before: SLOVITER, Chief Judge * and MANSMANN, Circuit Judge, and SAROKIN, District Judge.**

Opinion of the Court

SLOVITER, Ch. J.: As increased numbers of automobile manufacturers include high quality radios as standard features, the demand for such radios from independent sources dwindles and the businesses of those who distribute, sell and install such equipment suffer. The plaintiffs, a group of distributors, retailers, and installers of car radios, brought suit in the United States District Court for the Eastern District of Pennsylvania, claiming that the inclusion of Chrysler radios as a standard feature in Chrysler automobiles constitutes illegal tying in violation of both section 1 of the Sherman Act, 15 U.S.C. § 1 (1988), and section 3 of the Clayton Act, 15 U.S.C. § 14 (1988). They sought injunctive relief and treble damages. The district court granted Chrysler's motion for summary judgment, holding that plaintiffs had failed to show that Chrysler possessed the requisite market power to control the tying product needed to show a prohibited tying arrangement. We must consider the evidence of market power that a plaintiff must produce in order to survive a summary judgment motion under both the *per se* and rule of reason theories of antitrust liability.

I.

Background Facts and Procedural History

We construe the facts in the light most favorable to the plaintiffs because the district court disposed of this case pursuant to a motion for summary judgment. See

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* Hon. Dolores K. Sloviter became Chief Judge on February 1, 1991.

** Hon. H. Lee Sarokin, United States District Court for the District of New Jersey, sitting by designation.

Brenner v. Local 514, United Bhd. of Carpenters, 927 F.2d 1283, 1286 (3d Cir. 1991). Chrysler Motors Corporation, which manufactures ten to twelve percent of all model automobiles sold in the United States, is the third largest manufacturer of motor vehicles in the United States. Chrysler sells its automobiles to its dealers throughout the United States pursuant to franchise agreements. Chrysler is also engaged in the manufacture and installation of automotive sound equipment, which it sells to Chrysler dealers and others in competition with the plaintiffs. Plaintiffs define automotive sound equipment, the "tied product," as AM/FM stereo radios and radios with cassette or compact disc players. When we refer in this opinion to "car radios," the term is intended to encompass the broader group of autosound equipment products.

Until sometime in the mid-1970's, car radios were sold by Chrysler and other automobile manufacturers as optional features for new vehicles, which were separately priced. A customer could order a new car without a radio through a Chrysler dealer, and would not be charged for a radio. Customers also were able to choose from many car models on a dealer's lot which had no factory installed radio. As a result, the customer could then either order a different car radio from the Chrysler dealer or purchase one from an independent retailer.

By 1978 many of the domestic automobile manufacturers automatically installed a standard model radio in each new automobile and included its price in the base price of the vehicle. For the model years 1980 to 1983 Chrysler offered a "delete option." This enabled customers and dealers to order an automobile that did not have a factory installed radio and, if they did so, they would receive a credit in the purchase price.

Beginning with the 1984 model year, Chrysler began to eliminate the delete option on its models; by 1988 it eliminated the delete option on essentially all of its vehi-

cles, and the Chryslers were delivered to the dealers with factory installed radios. Chrysler gave its dealers a credit for radios removed by the dealers only if the customer purchased an upgraded Chrysler radio instead. It gave no credit to a dealer who replaced the Chrysler equipment with a non-Chrysler radio. It is thus not surprising that today over ninety-seven percent of the new Chrysler models have factory installed radios.

The four named plaintiffs each distribute and install car radios and, in addition, sell their equipment to automobile dealers for installation in new cars. With the exception of Northeast Electronics Supply, each of the plaintiffs also operates at least one retail store dealing in car radios. Plaintiffs sought to represent a class which they define as "all persons (excluding franchised dealers of Chrysler vehicles) who compete or who since January 1, 1984 competed with Chrysler in the sale of automotive sound equipment for installation in Chrysler vehicles sold in the United States." App. at 489.

In this suit, plaintiffs attack Chrysler's radio sales practices as illegal tying arrangements. More specifically, they challenge the following Chrysler practices: (1) the standardization of some form of automotive sound equipment on virtually all Chrysler cars; (2) the standardization of high quality car radios on many new Chryslers so that the price of the equipment is "hidden" in the price of the car; and (3) the elimination of the delete option whereby the purchaser previously received a credit when s/he opted to have the radio removed from the car.

Chrysler moved for summary judgment on July 15, 1988. For purposes of the motion, Chrysler conceded both that it has conditioned the sale of new Chrysler automobiles on the purchase and installation of Chrysler car radios and that this tying arrangement affects a not insubstantial amount of interstate commerce. Chrysler sought summary judgment on the ground that the plain-

tiffs could not show the requisite market power in a properly defined relevant market for the tying product.

The district court defined the relevant tying product market to include all cars manufactured for sale in the United States. It concluded that Chrysler's ten to twelve percent market share could not constitute market power as a matter of law and that therefore the plaintiffs could not recover under their *per se* theory of liability. The district court then defined the tied product market to include all automotive sound equipment sold in the United States for installation in automobiles. Because Chrysler's share of sales in this market ranged from three to seven percent during the time period in question, the district court found that Chrysler could neither restrain trade nor foreclose competition in the market as a matter of law. With no market power in the tying product market and Chrysler's inability to restrain trade in the tied product market, the district court concluded that the plaintiffs could not prevail under a rule of reason theory of liability. Finally, the district court rejected the plaintiffs' contention that a showing of market power over the tying product is not required under section 3 of the Clayton Act. On the same day, the district court denied the plaintiffs' pending motions, *inter alia*, for class action certification and to compel answers to interrogatories and production of documents regarding cost and profit information on Chrysler's radio sales.

The district court had jurisdiction pursuant to 28 U.S.C. § 1337 (1988). This court has jurisdiction pursuant to 28 U.S.C. § 1291 (1988). Our standard of review of the grant of a summary judgment motion is plenary. *Waldorf v. Shuta*, 896 F.2d 723, 728 (3d Cir. 1990). Summary judgment can be granted only if there is no genuine issue of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). If the evidence is such that a reasonable jury could return a verdict for the nonmoving

party, then summary judgment must be denied. *Id.* We turn to that issue.

II.

Per Se *Antitrust Liability*

A tying arrangement is effected when a seller conditions the sale of one product (the tying product) on the purchase of another product (the tied product). *Bogosian v. Gulf Oil Corp.* [1977-2 TRADE CASES ¶ 61,568], 561 F.2d 434, 449 (3d Cir. 1977), cert. denied, 434 U.S. 1086 (1978). Not every refusal to sell two products separately violates the antitrust laws. Instead, as the Supreme Court has explained, a tying arrangement is invalid when the seller exploits its control over the tying product

> to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms. When such "forcing" is present, competition on the merits in the market for the tied item is restrained and the Sherman Act is violated.

Jefferson Parish Hosp. Dist. No. 2 v. Hyde [1984-1 TRADE CASES ¶ 65,908], 466 U.S. 2, 12 (1984).

The Court also noted the adverse effects to the competitors of the seller from such arrangements, because the tying seller may be working toward a monopoly position in the tied product. "[E]ven if he is not, the practice of tying forecloses other sellers of the tied product and makes it more difficult for new firms to enter that market." *Id.* at 13 n.19 (quoting from Justice White's dissent in *Fortner Enterprises v. United States Steel Corp.* [1969 TRADE CASES ¶ 72,757], 394 U.S. 495, 513 (1969)). These new competitors must not only compete on price and quality but they must "offset the attraction of the tying product itself," which the Court noted was difficult because simultaneous entry into both markets is significantly more expensive than entry into the tied market

alone. *Id.* The Court further noted the adverse effect on consumers, stating:

> And from the standpoint of the consumer—whose interests the [Sherman Act] was especially intended to serve—the freedom to select the best bargain in the second market is impaired by his need to purchase the tying product, and perhaps by his inability to evaluate the true cost of either product when they are available only as a package.

Id. at 15.

For these reasons, those tying arrangements that pose an unacceptable risk of stifling competition are deemed unreasonable *per se*. That categorization is reserved for those "agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." *Northern Pac. Ry. Co. v. United States* [1958 TRADE CASES ¶ 68,961], 356 U.S. 1, 5 (1958); see *Continental T.V., Inc. v. GTE Sylvania, Inc.* [1977-1 TRADE CASES ¶ 61,488], 433 U.S. 36, 50 (1977).

A *per se* tying offense is established when the plaintiff proves three elements: (1) the existence of a tie; (2) that the defendant has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product; and (3) that a not insubstantial amount of interstate commerce is affected. *Bogosian v. Gulf Oil Corp.*, 561 F.2d at 449; *Ungar v. Dunkin' Donuts of America, Inc.* [1976-1 TRADE CASES ¶ 60,763], 531 F.2d 1211, 1223-24 (3d Cir.), cert. denied, 429 U.S. 823 (1976). For purposes of the district court's summary judgment determination, Chrysler conceded the presence of the first and third elements. With respect to the plaintiffs' *per se* claim, then, we need only decide whether the district court properly

ruled that Chrysler lacked sufficient economic power in the tying product market as a matter of law.

In *Jefferson Parish*, 466 U.S. at 16-17, the Supreme Court described three conditions under which courts have typically found sufficient economic power in the tying product market to justify *per se* condemnation. The seller may possess such economic power (1) if the government has granted it a patent or similar monopoly over a product; (2) if its share of the market is high enough so that it occupies a dominant market position; or (3) by offering a unique product or by having some market advantage not shared by its competitors.[1]

Plaintiffs do not argue that Chrysler's ownership of patents on some of its automobile parts confers any market power on Chrysler. Instead, they argue that the relevant tying market consists only of Chrysler automobiles, and contend that Chrysler has a dominant market position. Obviously, if we were to accept that definition of the relevant market, then plaintiffs' claim that Chrysler possessed economic power within the relevant market could not be dismissed on summary judgment.

The district court, however, defined the tying product market to include all automobiles manufactured for sale in the United States. Plaintiffs contend that by doing so the district court improperly engaged in fact finding because the scope of the relevant market is a question of fact for jury resolution and a reasonable jury could have concluded that the relevant market consisted solely of Chrysler automobiles.

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[1] For example, land may be such a unique product. See *Northern Pacific*, 356 U.S. at 7 (preferential routing clauses in sales contracts and leases of land adjacent to railroad track which essentially compelled holders to ship over the railroad lines all commodities produced or manufactured on the land constituted an illegal tie); *Ringtown Wilbert Vault Works v. Schuylkill Memorial Park, Inc.*, 650 F. Supp. 823, 825 (E.D. Pa. 1986) (tie of cemetery lots to burial vaults *per se* illegal when defendant conducts ten percent of burials in relevant market).

A market is composed of those products that are reasonably interchangeable for the purposes for which they are produced, considering price, use and qualities. See *United States v. E.I. DuPont de Nemours & Co.* [1956 TRADE CASES ¶ 68,369], 351 U.S. 377, 404 (1956); *Smith Kline Corp. v. Eli Lilly & Co.* [1978-1 TRADE CASES ¶ 62,007], 575 F.2d 1056, 1062-63 (3d Cir.), cert. denied, 439 U.S. 838 (1978). Market definition is indeed a question of fact dependent upon the special characteristics of the industry involved. *Weiss v. York Hosp.* [1984-2 TRADE CASES ¶ 66,211], 745 F.2d 786, 825 (3d Cir. 1984), cert. denied, 470 U.S. 1060 (1985); *Columbia Metal Culvert Co. v. Kaiser Aluminum & Chemical Corp.* [1978-1 TRADE CASES ¶ 62,064], 579 F.2d 20, 28 (3d Cir.), cert. denied, 439 U.S. 876 (1978). Nevertheless, the relevant market may be properly determined on summary judgment in some cases, assuming no material factual dispute. See *In re Air Passenger Computer Reservations Systems Antitrust Litigation* [1988-2 TRADE CASES ¶ 68,316], 694 F. Supp. 1443, 1459 (C.D. Cal. 1988).

With respect to the plaintiffs' *per se* theory, summary judgment may be particularly appropriate here because plaintiffs' contention that a properly defined market includes only Chrysler automobiles has been flatly rejected by several courts. See *Kingsport Motors, Inc. v. Chrysler Motors Corp.* [1981-1 TRADE CASES ¶ 63,888], 644 F.2d 566, 571 (6th Cir. 1981) (relevant market consists of sum total of medium-priced automobiles manufactured by Chrysler and all other automobile manufacturers and sold in the United States); *Merit Motors, Inc. v. Chrysler Corp.* [1976-1 TRADE CASES ¶ 60,959], 417 F. Supp. 263, 269 (D.D.C. 1976) ("Automobiles are more or less interchangeable items, and the price of one brand affects the demand for other brands. . . . Hence, it is clear that the relevant market . . . cannot be limited to the sale of one brand of automobile, but must include the fleet market for all brands of automobiles."), aff'd [1977-2 TRADE CASES ¶ 61,772], 569 F.2d 666 (D.C. Cir. 1977); see also

R.D. Imports Ryno Indus., Inc. v. Mazda Distrib. (Gulf), Inc. [1986-2 TRADE CASES ¶ 67,414], 807 F.2d 1222, 1225 n.2 (5th Cir.) (market not limited to Mazdas because "Mazda vehicles had a variety of domestic and foreign substitutes"), cert. denied, 484 U.S. 818 (1987); *Packard Motor Car Co. v. Webster Motor Car Co.* [1957 TRADE CASES ¶ 68,682], 243 F.2d 418, 420 (D.C. Cir.) (other cars are "reasonably interchangeable by consumers for the same purposes" as Packard cars and are therefore in competition with Packard cars), cert. denied, 355 U.S. 822 (1957); *Mogul v. General Motors Corp.* [1975-1 TRADE CASES ¶ 60,296], 391 F. Supp. 1305, 1313 (E.D. Pa. 1975) (market not limited to Cadillacs), aff'd, 527 F.2d 645 (3d Cir. 1976).

Contrary to plaintiffs' contention, our decision in *Coleman Motor Co. v. Chrysler Corp.* [1975-2 TRADE CASES ¶ 60,592], 525 F.2d 1338 (3d Cir. 1975), does not provide support for their proffered market definition. In *Coleman*, we set aside a jury verdict on the ground that the district court had improperly instructed the jury, at least implicitly, that the relevant market consisted of retail trade of Dodge automobiles alone. *Id.* at 1349. Because there was some evidence that Dodge automobiles compete with all other automobiles, the district court erred in limiting the relevant market in its interrogatory. Nowhere in *Coleman* did this court encourage inclusion of a single brand of automobile in the product market definition.

In any event, the evidence in the present case overwhelmingly supports Chrysler's contention that the relevant market includes all automobiles manufactured for sale in the United States. The summary judgment record contains affidavits submitted by Chrysler as well as reports of Chrysler dealer meetings supporting Chrysler's position that Chrysler dealers perceive themselves as competing with dealers handling other cars with respect to price, features, quality, comfort, warranties, financing

and other terms. Furthermore, the consumers compare these terms across different manufacturers' automobiles.

In contrast, the evidence relied upon by plaintiffs, the affidavit submitted by their expert witness, Dr. Adams, does not support their narrow market definition because Dr. Adams states his opinion only with respect to the proper definition of the tied product market. He never attempts a proper definition of the tying product market. Moreover, the affidavit does nothing more than state a conclusion, and we deem it inadequate to raise a factual issue which will withstand summary judgment. Absent any evidence that Chrysler does not compete with other automobile manufacturers, we conclude that the district court properly defined the relevant market on summary judgment to include all automobiles sold in the United States.

During the time period in question, ten to twelve percent of the cars sold in the United States were Chrysler automobiles. According to controlling Supreme Court precedent, Chrysler's market share is not large enough to justify *per se* condemnation of its tying practices. In *Jefferson Parish*, for example, the Supreme Court held that because the defendant hospital serviced only thirty percent of the patients in the geographic area, it lacked the "kind of dominant market position that obviates the need for further inquiry into actual competitive conditions." 466 U.S. at 26-27; see also *Times-Picayune Publishing Co. v. United States* [1953 TRADE CASES ¶ 67,494], 345 U.S. 594, 612-13 (1953) (publishing company which owns newspapers with thirty-three to forty percent share of advertising market not in a position of market dominance); *Allen-Myland, Inc. v. International Business Machines Corp.* [1988-2 TRADE CASES ¶ 68,193], 693 F. Supp. 262, 277-78 (E.D. Pa. 1988) (twenty to thirty-two percent market share not enough to constitute market power under *per se* test). Chrysler's market share is substantially smaller than the market shares of the defend-

ants in both *Jefferson Parish* and *Times Picayune*, and thus the district court did not err in determining that Chrysler did not possess the requisite market share in the tying product market as a matter of law.

Nor are Chrysler automobiles sufficiently unique to warrant application of the *per se* rule to Chrysler's radio practices. Uniqueness for *per se* purposes "presupposes that competitors are in some way foreclosed from offering the distinctive product." *Carpa, Inc. v. Ward Foods, Inc.*, 536 F.2d 39, 48 (5th Cir. 1976). The plaintiffs assert that Chrysler is a popular trademark, but "a prestigious trademark is not itself persuasive evidence of economic power." See, e.g., *Mozart Co. v. Mercedes-Benz of North America, Inc.* [1987-2 TRADE CASES ¶ 67,789], 833 F.2d 1342, 1346 (9th Cir. 1987), cert. denied, 488 U.S. 870 (1988); *Carpa, Inc. v. Ward Foods, Inc.* [1976-2 TRADE CASES ¶ 60,995], 536 F.2d at 48 (trademark provides evidence of market leverage, but it cannot alone demand presumption of economic power), *Tominaga v. Shepherd* [1988-1 TRADE CASES ¶ 67,985], 682 F. Supp. 1489, 1494 (C.D. Cal. 1988). Nor is intense brand loyalty sufficient to presume market power. *Discnos Artisticos E Industriales, S.A. v. Work* [1989-1 TRADE CASES ¶ 68,598], 714 F. Supp. 46, 48 (E.D.N.Y. 1989); see also *Grappone, Inc. v. Subaru of New England, Inc.* [1988-2 TRADE CASES ¶ 68,299], 858 F.2d 792, 797 (1st Cir. 1988) ("[V]irtually every seller of a branded product has *some* customers who especially prefer its product. But to permit that fact alone to show market power is to condemn ties that are bound to be harmless; including some that may serve some useful social purpose."). Of course, these factors may prove relevant in a rule of reason inquiry, the subject to which we now turn. For purposes of *per se* illegality, however, we conclude that the district court properly rejected the plaintiffs' theory.

III.

Rule of Reason Inquiry

When, as here, a seller does not possess the market power that enables it to force customers to purchase a second product as a condition to obtaining the tying product, an antitrust violation for tying can nonetheless be established by evidence that the tie is an unreasonable restraint on competition in the relevant market. *Jefferson Parish*, 466 U.S. at 18. "The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition, or whether it is such as may suppress or even destroy competition." *Hand v. Central Transport, Inc.* [1985-2 TRADE CASES ¶ 66,872], 779 F.2d 8, 10 (6th Cir. 1985) (per curiam) (quoting *Davis-Watkins Co. v. Service Merchandise* [1982-2 TRADE CASES ¶ 64,901], 686 F.2d 1190, 1196 (6th Cir. 1982), and *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918)). The rule of reason focuses directly on the challenged restraint's impact on competitive conditions and requires the court to examine the purposes and effects of an allegedly anticompetitive practice to determine whether the general standards of the antitrust laws have been violated. See *Fortner Enterprises v. United States Steel Corp.* [1969 TRADE CASES ¶ 72,757], 394 U.S. 495, 500 (1969); *Carl Sandburg Village Condo. Ass'n. v. First Condo. Dev. Co.* [1985-1 TRADE CASES ¶ 66,497], 758 F.2d 203, 210 (7th Cir. 1985); *Allen-Myland*, 693 F. Supp. at 293.

The district court granted summary judgment in favor of Chrysler on plaintiffs' rule of reason theory because it interpreted *Jefferson Parish* to require a plaintiff to prove that the defendant has market power in both the tying and tied product markets. The court stated that "the majority opinion [in *Jefferson Parish*] nowhere states or implies that market power over the tying product is not required under the rule of reason." Typescript

Memorandum Opinion at 15. Inasmuch as the court had already ruled in connection with the plaintiffs' *per se* claim that Chrysler's ten to twelve percent share of a market defined as all automobiles sold in the United States was insufficient as a matter of law to constitute market power, it followed that plaintiffs failed to show the market power the court deemed necessary in the tying product market for the rule of reason analysis.

The court defined the tied product market as all automotive sound equipment sold in the United States for installation in automobiles. Because Chrysler was unable to restrain competition in the tied product market in light of its three to seven percent share of that market, the district court ruled that plaintiffs had not shown that Chrysler's tying practices failed under the rule of reason analysis.

It is apparent that if the district court correctly analyzed the requirements for showing an unreasonable restraint of trade, the rule of reason analysis would be collapsed into the *per se* test. If both tests have identical market power requirements, then a tying practice that failed to withstand the rule of reason analysis would *ipso facto* constitute a violation under the *per se* test. Indeed, it would be much harder to establish a violation under the rule of reason test because of the need to make an extensive inquiry into the purpose and actual anticompetitive effects of the practice. Although the four concurring Justices in *Jefferson Parish* advocated only a single analysis in tying cases, even they did not suggest accomplishing that by abrogating the rule of reason analysis; rather they sought to abolish the *per se* test. The district court's reasoning is anomalous because in effect it would do precisely the opposite.

In any event, the majority in *Jefferson Parish* plainly held that both tests continue to be applicable. The district court's holding that plaintiffs must show that Chrysler has market power in the tying product market suffi-

cient to force a tie, even when determining whether the tying practice is an unreasonable restraint, cannot be reconciled with *Jefferson Parish*. There the Court stated that even when "the seller does not have either the degree or kind of market power that enables him to force customers to purchase a second, unwanted product in order to obtain the tying product," an antitrust violation can be established if there is an unreasonable restraint on competition. 466 U.S. at 17-18; see also Note, *Market Power and Monopoly Power in Antitrust Analysis*, 75 Cornell L. Rev. 190, 194-95 nn. 12 & 15 (1989) (after *Jefferson Parish*, plaintiffs can still proceed under a rule of reason analysis even though there is no showing of market power).

The analysis used by the Court in *Jefferson Parish* to determine whether there was an unreasonable restraint on trade is instructive: the Court focused only on whether plaintiff had shown that the hospital's requirement that patients use only the anesthesiological services provided by the doctors' group with which it had an exclusive contract actually affected competition among anesthesiologists. In other words, rather than performing a simplistic market share analysis, the dispositive issue for the majority was the effect of the challenged practice, whether viewed as a tie or exclusive dealing contract, on price or quality of the tied item. 466 U.S. at 30 n.49; cf. *FTC v. Indiana Federation of Dentists* [1986-1 TRADE CASES ¶ 67,117], 476 U.S. 447, 460-61 (1986) ("Since the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, proof of actual detrimental effects . . . can obviate the need for an inquiry into market power, which is but a surrogate for detrimental effects.").

We do not understand the four concurring Justices in *Jefferson Parish* to have taken a contrary position. Although they would have required some showing of market

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power in the tying product market, the concern of those Justices seems to have been over whether the defendant possessed at least enough leverage in the tying product market to effect a tie. In the present case, Chrysler has already conceded the presence of a tie. Moreover, it appears that the concurring Justices are likely to suspend this market power requirement in those cases where an effect on the tied product market is shown. See 466 U.S. at 35 ("the purpose of tying law has been to identify and control those tie-ins that have a demonstrable exclusionary impact in the tied product market . . . or that abet the harmful exercise of market power that the seller possesses in the tying product market"). Thus, the appropriate tying analysis is not accomplished by a mechanical market share inquiry under either the majority or concurring opinions but rather entails a realistic appraisal of the effect of the arrangement on the relevant market.

We do not dwell on the purpose of Chrysler's tie because it seems almost self-evident that the tie was deliberate. Its prior practice had been to sell the car and the radio independently.[2] However, an internal Chrysler memorandum in 1983 by a departmental specialist to the manager of Options and Mix Merchandising stated, "[w]e will support product planning's proposal to make radios standard on everything. . . . Our field force should have ample reason to *force our radios in place of aftermarket installations*." App. at 301 (emphasis supplied). Thus, we focus on the effects of the tying practice.

Before reviewing the evidence of the effect on the market allegedly restrained, we must consider plaintiffs' challenge to the court's definition of the tied product market. The district court defined that market to include not only car radios sold by independents but also those sold by

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[2] This trade history serves to distinguish the car/car radio situation from the shoes/shoe laces and suit/trousers hypotheses that Chrysler posits. In the latter instances, only one product is involved and therefore no tie exists.

other car manufacturers. We consider the inclusion of each separately.

Chrysler introduced evidence that most of the radios made by independent manufacturers are built in a standard size, known as DIN (Deutsche Industrie Norm). The DIN size is slightly smaller than most systems built by automobile manufacturers themselves, but it can be matched to the open space in a vehicle's dashboard by means of an inexpensive face plate. DIN units can therefore be installed in most, if not all, domestically produced automobiles as well as in most imports and can consequently compete with Chrysler radios for installation in its automobiles. Thus, they are effectively in competition with radios sold and installed by Chrysler.

In contrast, Chrysler apparently introduced no evidence indicating that the radios produced by other car manufacturers can fit into Chrysler automobiles or that they are installed in other cars. If the radios supplied by, for example, Ford and General Motors cannot be used in Chrysler vehicles, then they cannot realistically be deemed part of the tied market because they do not compete with Chrysler's radios. See *Weiss v. York Hosp.* [1984-2 TRADE CASES ¶ 66,211], 745 F.2d 786, 826 (3d Cir. 1984) (in defining a market in an antitrust case, the fact finder must take into account the realities of competition). We do not suggest that in fact the radios supplied by other car manufacturers could not be deemed to be functionally competitive with Chrysler radios installed in Chrysler automobiles. This would depend, in part, on whether a Chrysler owner could realistically obtain a Ford radio if the owner preferred. We note merely that the record on summary judgment contained insufficient evidence to support the district court's broad market definition, and it follows that the district court could not discount the effect of the tie on the tied product market merely on the basis of Chrysler's small share of the market defined by the court.

Regardless of the proper tied product market definition, however, plaintiffs proffered sufficient evidence to raise at least a genuine issue of fact regarding adverse effects of the tie on competition in the market for sales or car radios. The plaintiff in *Jefferson Parish* failed to prove an unreasonable restraint on trade because, even after a full trial, he produced no evidence of any effect of the tying arrangement on either the price or the quality of the anesthesiologists who worked at the hospital. 466 U.S. at 31 n.52. In addition, there was no evidence of any complaints concerning the quality of the hospital's anesthesiological services.

In contrast, the plaintiffs in this case have presented abundant evidence that Chrysler dealers often complained to the company, both before and after Chrysler imposed the tie, that radios Chrysler supplied were of poor quality and were overpriced. For example, dealers at a council meeting in Cincinnati in September 1987 complained that "[r]adios are extremely overpriced," App. at 298, and it was commented in an internal Chrysler memorandum dated May 6, 1987 that the dealers "are convinced that the higher the cost of a Chrysler radio, the lower the quality of the radio." App. at 295. Similarly, it was stated in a Chrysler-Plymouth Dealer Council Synopsis of the 1985 Spring Meeting that:

> *Council wishes to advise the Corporation that the quality of our radios is below industry standards.* The dealer body is receiving constant complaints on reception of local stations, even after repairs have been attempted. Council requests that the Corporation research the situation and make necessary changes to improve radio quality. Our poor radio quality destroys our current image of 'Being the Best.'

App. at 238 (emphasis in original). Furthermore, a survey of Chrysler dealers dated January 1984 conducted during the period when the delete option was still avail-

able showed that fifty-two percent of those dealers surveyed would have ordered more Chrysler factory radios if they were more price competitive. App. at 303.

Moreover, plaintiffs also presented a consumer survey which reported that 13.4 percent of Chrysler buyers would have preferred to choose a different brand or type of radio than that supplied with their cars and that 20.8 percent would have preferred to have had the option to purchase a car without its accompanying automotive sound equipment. This evidence, if credited by a jury, could show that Chrysler was in a position to foist an inferior product on some portion of buyers of the tied product.

Plaintiffs also proffered deposition testimony stating that they, as independent suppliers, retailers and installers, were suffering from decreased profit margins and sales volumes as a result of the tie. There is evidence that the profit margin on the sale and installation of car radios by independents was as high as eighty-five percent. App. at 141. Chrysler's inclusion of the radio as a standard feature of its automobiles enabled it to reap high profits on the sale of more radios as a result of its insulation from competition with independent retailers and installers on the basis of price, service, or quality.[3] This evidence, if credited by a jury, would tend to show that Chrysler's tie of radios to the purchase of Chrysler cars caused the two principal effects which the Supreme Court

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[3] We note that there is respected authority that market power can be shown not only by share of the market but alternatively by evidence of the profitability of a particular practice. See Pitofsky, *New Definitions of Relevant Market and the Assault on Antitrust*, 90 Colum. L. Rev. 1805, 1847 (1990) ("When relatively high profit levels exist, the market definition process can be abandoned entirely and market power inferred directly from profitability."). Although we do not reach plaintiffs' argument that the district court erred in failing to require Chrysler to produce documents relating to the profitability of its radio sales, we assume that on remand the court will reconsider the relationship of such evidence to an injuiry into restraint on competition in the tied product market.

identified in *Times-Picayune* as the harms from tying arrangements, i.e., the inhibition of buyers from making their preferred purchase choice on the merits and the exclusion of competing sellers in the tied product market from the market. See *Times-Picayune*, 345 U.S. at 605.

In evaluating the effect of the tying practice at issue on the autosound retail and installation market we deem it significant that there was evidence that the other car manufacturers are also making radios a standard feature in their automobiles. This spreading practice, which was not referred to in the district court's opinion, has been admitted by Chrysler. Thus, we do not encounter a market condition analogous to the frequently cited single neighborhood grocer who ties the sale of flour to the sale of sugar. See *Jefferson Parish*, 466 U.S. at 12 (quoting *Northern Pacific*, 356 U.S. at 7) ("[I]f one of a dozen food stores in a community were to refuse to sell flour unless the buyer also took sugar it would hardly tend to restrain competition in sugar if its competitors were ready and able to sell flour by itself."). Rather, if indeed many of Chrysler's competitors are engaging in a similar tie, the barriers to entry into the tied market will be raised immeasurably, and possibly permanently. This is particularly relevant in light of the Supreme Court's statements that the antitrust laws are designed to prevent such barriers to entry in the tied product market. See, e.g., *Jefferson Parish*, 466 U.S. at 13 n.19, 14.

Chrysler argues that we should rely on competition among car manufacturers with respect to the price of automobiles as a whole to prevent consumer exploitation. However, because the radio is a very small component of the car purchase and is relatively inexpensive compared to the price of the automobile, competition at the automobile level is not likely to insure competition in the car radio product market.[4] That is the market to which our

[4] It is significant that unlike flour and sugar, items of relatively equal value, there is evidence in this case that the typical consumer

inquiry must be directed in this case, and Chrysler has not shown why the effect of the tie on that market will be any less anticompetitive just because the car manufacturers may be engaged in fierce competition at another level.

Of course, even if it is determined that Chrysler's tie of car radios does have an anticompetitive effect in the car radio market, that tie would not necessarily violate the antitrust laws. Under the rule of reason analysis, the economic harms must be weighed against any procompetitive benefits resulting from the tie. In the present case, for example, Chrysler presented some evidence that a company it hired to perform a market research study advised Chrysler that it could improve order stability and reduce manufacturing costs by clustering the options it offered on its cars. In addition, it may be that there is no economic reason for independent dealers to exist solely to install radios manufactured by others into new cars. The detailed and careful balance required under the rule of reason may very well favor Chrysler's tying practices in the end. Nevertheless, the rule of reason inquiry should not have been determined in summary fashion on the record that was before the district court, and we will remand for further proceedings.

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has already decided to purchase a particular brand of automobile, a major decision, before considering the relatively minor decision regarding preferences as to a car radio. This court has previously expressed concern that a minor decision may be insulated from the competitive pressures of the marketplace due to the nature of an accompanying major decision and the order in which the decisions are typically made by consumers. See *Weiss v. York Hosp.*, 745 F.2d at 826 (jury could reasonably have concluded that a consumer of hospital services makes one purchase decision and that further decisions concerning his treatment are relatively insulated from competition). Thus, the normal market pressures from competition, which are expected when one sells independent products together, such as flour and sugar, and which, at least theoretically, protect against monopoly profits and inferior products, may not be operating in the tied product market here.

IV.

The Clayton Act

The district court held that the standard for antitrust liability under section 3 of the Clayton Act is the same as it is under section 1 of the Sherman Act. Because it believed that market power over the tying product was a necessary element of even an unreasonable restraint of trade analysis under the Sherman Act, it granted Chrysler summary judgment on plaintiffs' Clayton Act claim. Because we have restored the plaintiffs' Sherman Act claim under a rule of reason theory, the Clayton Act claim should survive even if the market power requirement is the same as that which must be shown under section 1 of the Sherman Act.

V.

Conclusion

For the foregoing reasons, the district court's order granting summary judgment over plaintiffs' *per se* claim will be affirmed; the order granting summary judgment over the claim alleging that the tie effected an unreasonable restraint of trade under the Sherman Act and violated the Clayton Act will be reversed and the matter remanded to the district court for further proceedings in light of the foregoing opinion. Each party to bear its own costs.

APPENDIX C

UNITED STATES DISTRICT COURT
E.D. PENNSYLVANIA

Civ. A. No. 88-0083

TOWN SOUND AND CUSTOM TOPS, INC., SUBURBAN AUTO SOUND & COMMUNICATIONS, INC., NORTHEAST ELECTRONICS, INC. and DOMINION RADIO SUPPLY, INC., on Behalf of Themselves and all others Similarly Situated

v.

CHRYSLER MOTOR CORP.

July 3, 1990

Donald B. Lewis, Philadelphia, Pa., Dickstein Shapiro & Morin, Washington, D.C., for plaintiffs.

Arthur Makadon, Ballard, Spahr, Andrews & Ingersoll, Philadelphia, Pa., Joseph Angland, Dewey Ballantine Bushby Palmer & Wood, New York City, pro hac vice, Gerald M. Rosberg, Dewey Ballantine Bushby Palmer & Wood, Washington, D.C., pro hac vice, Lewis H. Goldfarb, Chrysler Motors, Detroit, Mich., pro hac vice for defendant.

MEMORANDUM AND ORDER

DuBOIS District Judge.

Plaintiffs brought this proposed antitrust class action against the defendant, Chrysler Motors Corp. ("Chrys-

ler"), asserting claims under Section 1 of the Sherman Act, 15 U.S.C. § 1[1], and Section 3 of the Clayton Act, 15 U.S.C. § 14[2]. The Court has jurisdiction over the suit under 15 U.S.C. § 15 and 28 U.S.C. § 1337.

Plaintiffs allege that Chrysler has created an unlawful tying arrangement through its sale of car radios and cassette players—i.e. automotive sound equipment—as a standard feature on its vehicles. Plaintiffs seek to enjoin Chrysler from continuing to make such sales and to recover damages from Chrysler as a result of past sales.

Presently before the Court is Chrysler's Motion for Summary Judgment. For the reasons set forth below, the Court will grant the Motion.

I. BACKGROUND

Plaintiffs are four independent corporations which distribute and install automotive sound equipment. Plaintiffs sell automotive sound equipment to automobile dealers for installation either by the dealer or by the plaintiffs. Plaintiffs also sell automotive sound equipment directly to consumers through retail outlets operated by the plaintiffs and through distribution to independent retailers.

Defendant Chrysler is a corporation which manufactures and sells motor vehicles. Chrysler manufactures many of the components of its vehicles, including automotive sound equipment. Chrysler also purchases automotive sound equipment from independent suppliers. Chrysler sells its vehicles to consumers through a network of retail dealers located throughout the United States.

Chrysler does not dispute plaintiffs' allegations regarding Chrysler's sale of automotive sound equipment as a

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[1] *See*, note 23, *infra*.

[2] *See*, note 24, *infra*.

standard feature.[3] Between 1983 and the present, Chrysler has steadily increased the number of its vehicles sold with automotive sound equipment as a standard feature. At present, Chrysler sells approximately 97 percent of its vehicles with automotive sound equipment as a standard feature. See Complaint ¶¶ 34-41

In their proposed class action, plaintiffs seek to represent all distributors and installers of automotive sound equipment who compete or have competed against Chrysler since January 1, 1984, for the sale and installation of automotive sound equipment in Chrysler vehicles. *See* Complaint ¶¶ 8-15.

II. STANDARD FOR SUMMARY JUDGMENT

The Federal Rules of Civil Procedure provide that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. Rule 56(c).

When a motion for summary judgment is made, the adverse party "may not rest upon the mere allegations or denials of his pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. Rule 56(e). If the adverse party fails to set forth such material facts, summary judgment shall be entered against the party. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986); *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*,

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[3] A standard feature is a feature for which the customer cannot obtain a credit against the base price of the automobile even if the feature is not purchased. A delete option, by contrast, is a feature for which a credit is given to the customer if the feature is not purchased.

475 U.S. 574, 586-87, 106 S.Ct. 1348, 1355, 89 L.Ed.2d 538 (1986); *see also Equimark Comm. Fin. Co. v. C.I.T. Fin. Serv. Corp.*, 812 F.2d 141 (3rd Cir.1987).

Plaintiffs argue that summary judgment is inappropriate in complex antitrust suits. The Court disagrees. Although summary judgment should be used sparingly in complex antitrust suits, *see Poller v. Columbia Broadcasting Systems, Inc.*, 368 U.S. 464, 82 S.Ct. 486, 7 L.Ed.2d 458 (1962), it is appropriate in such suits where trial would merely result in delay and expense. *See, e.g., A.I. Root Co. v. Computer/Dynamics, Inc.*, 615 F.Supp. 727 (N.D. Ohio 1985), *aff'd* 806 F.2d 673 (6th Cir.1986); *Harold Friedman, Inc. v. Kroger Co.*, 581 F.2d 1068, 1080 (3rd Cir.1978); *Tripoli Co. v. Wella Corp.*, 425 F.2d 932, 935 (3rd Cir.1970), *cert. denied*, 400 U.S. 831, 91 S.Ct. 62, 27 L.Ed.2d 62 (1970) cited in *Chuy v. Philadelphia Eagles*, 407 F.Supp. 717, 721 (E.D.Pa.1976).

Furthermore, of the antitrust suits which have been summarily dismissed, several involve alleged tying violations. *See, e.g., Robert's Waikiki U-Drive, Inc. v. Budget Rent-A-Car Systems, Inc.*, 491 F.Supp. 1199 (D.Hawaii 1980), aff'd 732 F.2d 1403 (9th Cir.1984); *Tominaga v. Shepherd*, 682 F.Supp. 1489 (C.D.Cal.1988); and *Klo-zik Co. v. General Motors Corp.*, 677 F.Supp. 499 (E.D.Tex. 1987).

III. DISCUSSION

A tying arrangement is defined as "an agreement by a party to sell one product [the tying product] but only on the condition that the buyer also purchases a different (or tied) product." *Northern Pacific R. Co. v. United States*, 356 U.S. 1, 5, 78 S.Ct. 514, 518, 2 L.Ed.2d 545 (1958). The antitrust laws do not prohibit all tying arrangements. Only those tying arrangements which are anticompetitive in defined markets are unlawful. In order to determine whether a tying arrangement is unlawful, courts have relied on the *per se* rule and the rule

of reason. *See Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 104 S.Ct. 1551, 80 L.Ed.2d 2 (1984) (5-4 majority reaffirmed use of both standards in tying cases). Under the *per se* rule, a tying arrangement is presumed unlawful—without inquiry into the effects in the market—if the seller has market power over the tying product. Absent a *per se* violation, a tying arrangement may be found unlawful under the rule of reason. The rule of reason requires proof of an actual unreasonable restraint of trade in the market for the tied product. Accordingly, in deciding the Motion for Summary Judgment, the Court will consider Chrysler's sales practice under each of these standards.

A. *Per Se Rule*

In order to establish a tying arrangement as *per se* unlawful, the plaintiff must prove the following three elements: (1) the tie links two separate products with distinct markets; (2) the tie affects a not insubstantial amount of interstate commerce; and (3) the seller has market power over the tying product. *See generally Jefferson Parish* 466 U.S. at 13-22, 104 S.Ct. at 1558-64; *see also Grappone, Inc. v. Subaru of New England, Inc.*, 858 F.2d 792 ("Grappone") (1st Cir.1988).

For purposes of this Motion, the parties agree that Chrysler is selling separate products in separate markets and that Chrysler's sale of automotive sound equipment affects a not insubstantial amount of interstate commerce. That leaves for determination the question whether there is any evidence that Chrysler has market power over the tying product. Chrysler contends that it has no such market power in any plausibly defined market, and the Court agrees.

1. The Tying Product Market

In order to determine whether Chrysler has market power over the tying product, it is essential to define the

tying product market. *See, e.g., Drs. Steuer & Latham, P.A. v. National Medical Enterprises* 672 F.Supp. 1489 (D.S.C.1987). The product market has been defined in antitrust cases not involving tying arrangements as the "areas of effective competition" within which a seller operates. *Standard Oil Co. of California v. United States*, 337 U.S. 293, 299 n. 5, 69 S.Ct. 1051, 1055 n. 5, 93 L.Ed. 1371 (1949). Specifically, a product market is "composed of products that have reasonable interchangeability for the purposes for which they are produced—price, use and qualities considered." *United States v. E.I. duPont de Nemours & Co.*, 351 U.S. 377, 404, 76 S.Ct. 994, 1012, 100 L.Ed. 1264 (1956); *Brown Shoe Co. v. United States*, 370 U.S. 294, 82 S.Ct. 1502, 8 L.Ed.2d 510 (1962); *see also SmithKline Corp. v. Eli Lilly & Co.*, 575 F.2d 1056, 1063 (3d Cir.), *cert. denied*, 439 U.S. 838, 99 S.Ct. 123, 58 L.Ed.2d 134 (1978). These same principles of market definition have been relied on by courts when defining product markets for purposes of a tying analysis. *See, e.g. Allen-Myland, Inc. v. IBM Corp.*, 693 F.Supp. 262 (E.D.Pa.1988) (court rejected plaintiffs' proposed tying product market limited to IBM's own product line); *see also A.I. Root Co. v. Computer/Dynamics, Inc.* 806 F.2d 673 (6th Cir.1986) (same); *Will v. Comprehensive Accounting Corp.*, 776 F.2d 665 (7th Cir.1985) (same); *Hudson's Bay Co. v. American Legend Cooperative* 651 F.Supp. 819 (D.N.J.1986) (same).

Chrysler argues that the tying product market is all automobile manufacturers which compete with Chrysler for the sale of automobiles in the United States. In support of its market definition, Chrysler has provided the Court with uncontroverted affidavits demonstrating that Chrysler automobiles are reasonably interchangeable with, and compete against, the automobiles produced by other manufacturers. Chrysler's submissions on that issue are not directly addressed or contested by plaintiffs[4] and may be summarized as follows:

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[4] *See* Section IV, *infra*.

First, consumers perceive Chrysler automobiles as reasonably interchangeable with other automobile makes. Market studies submitted by Chrysler state that prospective new buyers commonly compare Chrysler's product offerings with the offerings of other manufacturers.[5] A wide range of factors—including price, features, aesthetic appeal, reputation, and comfort—enter into such comparisons, and Chrysler's sales depend directly upon its ability to impress consumers favorably with respect to these factors.[6]

Second, Chrysler's advertising stresses the price and qualities of its vehicles in comparison to those of its competitors.[7] Furthermore, the automotive media—which consumers often consult before purchasing motor vehicles—perceive Chrysler vehicles as competing against comparable vehicles made by other manufacturers. The automotive media routinely evaluate Chrysler's vehicles in comparison to those of other manufacturers.[8]

Third, Chrysler is constrained in pricing its vehicles by the prices its competitors charge for comparable vehicles.[9] This pricing constraint reflects the cross-elasticity of demand that exists between Chrysler vehicles and the vehicles produced by its competitors.[10]

Fourth, the business and financial communities and government agencies view Chrysler as competing for

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[5] Affidavit of Jack L. Warren, ¶ 7.

[6] *Id.* ¶ 6.

[7] *Id* ¶ 9.

[8] *Id* ¶ 12.

[9] Affidavit of Franklin M. Fisher, ¶ 15.

[10] Two goods exists in the same market if there is a relatively high cross-elasticity of demand between the goods. Two goods have a relatively high cross-elasticity of demand if an increase in the price of one good results in an increase in consumption of the other good. *See, e.g. Brown Shoe Co. v. United States*, 370 U.S. 294, 325, 82 S.Ct. 1502, 1523, 8 L.Ed.2d 510 (1962).

sales against other automobile manufacturers. Market studies by these groups analyze the different automobile producers, including Chrysler, as competing in the same market.[11]

Based on the foregoing, the Court defines the tying product market as all automobile manufacturers which compete with Chrysler for the sale of automobiles in the United States.

2. Definition of Market Power

For purposes of a tying violation, market power has a precise meaning. In *Jefferson Parish*, the Supreme Court defines market power in a tying case as follows: "As an economic matter, market power exists whenever prices can be raised above the levels that would be charged in a competitive market." *See Jefferson Parish* 466 U.S. at 26, n. 46, 104 S.Ct. at 1565, n. 46. *See also United States Steel Corp v. Fortner Enterprises Inc.* 429 U.S. 610, 620, n. 13, 97 S.Ct. 861, 868, n. 13, 51 L.Ed.2d 80 (1977) (market power is defined as "power over price"). In *Jefferson Parish*, the Supreme Court also stated that evidence of market power may be shown by: (1) exclusive control over the market through a patent or copyright; (2) domination of the market as evidenced by a high market share; or (3) a unique product that competitors are not able to offer. *See Jefferson Parish* 466 U.S. at 16-17, 104 S.Ct. at 1560-61.

In this case, Chrysler argues that it does not have market power because Chrysler cannot raise prices above competitive levels in the automobile market and profitably sustain prices at that level.[12] Chrysler has provided the Court with uncontroverted affidavits demonstrating

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[11] Affidavit of Franklin M. Fisher ¶ 9.

[12] Although not expressly stated in *Jefferson Parish*, market power exists whenever the seller can raise prices above competitive levels in the marketplace and profitably sustain prices at that level.

that Chrysler is a "price-follower" in the automobile market and plaintiffs' submissions do not directly address or contest these submissions.[13] As a "price-follower", Chrysler increases the prices of its vehicles following an increase in prices throughout the automobile industry. If Chrysler were to unilaterally raise its prices, other automobile manufacturers would not follow suit and Chrysler would lose sales.[14] Accordingly, the Court finds that Chrysler does not have "power over price" in the tying product market.

The Court must also address the other market conditions set forth in *Jefferson Parish* which may provide evidence of market power. A review of all submissions by the parties discloses no evidence of market power by Chrysler based on these market conditions. First, this case does not involve control over a market through a patent or copyright. Although Chrysler may have patents on individual parts of its automobiles, Chrysler does not have, and plaintiffs do not allege, control by Chrysler over a market through such patents.

Second, in terms of market share, Chrysler does not have the level of market share in the tying product market associated with market power. From 1983 to the present, the time period relevant to this litigation, Chrysler has sold 10 to 12 percent of the new cars sold in the United States.[15] General Motors, by contrast, has sold 35 to 45 percent of the new cars sold, and Ford has sold 17 to 20 percent of the market. Furthermore, several foreign

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[13] *See* Section IV, *infra*.

[14] Affidavit of Franklin M. Fisher, ¶ 15 ("Chrysler's pricing is significantly constrained by its . . . competitors. The marketplace would quickly defeat any attempt by Chrysler to unilaterally raise prices to supracompetitive levels."); *see also* Affidavit of Omar Matt, ¶ 9.

[15] Affidavit of Franklin M. Fisher, Appendix B (*citing Ward's Automotive Yearbook 1988*, p. 161).

manufacturers, Honda, Toyota, and Nissan, each have 5 to 7 percent of the market.[16]

Although there is no fixed threshold of market share required for market power and market share is but one measure of a seller's market power, Chrysler's 10 to 12 percentage share of the automobile market is considerably below the level of market share associated with market power. *See, e.g. Jefferson Parish* 466 U.S. at 26-27, 104 S.Ct. at 1565-66 (30 percent market share insufficient for market power); *Times-Picayune Pub. Co. v. United States*, 345 U.S. 594, 611-613, 73 S.Ct. 872, 881-83, 97 L.Ed. 1277 (30 to 40 percent market share insufficient for market power); *Allen-Myland* 693 F.Supp. at 278 (20 to 30 percent market share insufficient for market power).

Furthermore, even if the Court defined a tying product market based on subsections of the automobile market, such as geographic regions or automobile types, Chrysler does not have the level of market share required for market power in any such subsection. On the contrary, Chrysler maintains a similar 10 to 12 percentage share of the automobile market across various geographic regions and vehicle lines.[17] *See also Grappone, supra*, 858 F.2d at 797.

Third, for a showing of "uniqueness", the emphasis is not on whether the seller is selling a factually unique product; rather, the emphasis is on whether the seller has some advantage not shared by its competitors in the marketplace. *See Fortner* 429 U.S. at 620, 97 S.Ct. at 867 (1977). This advantage has been defined by the courts in terms of barriers to entry into the marketplace. "If competitors can design and offer a package similar to defendant's product for a similar cost, there is no barrier and no market power, and hence no special

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[16] *Id.*

[17] Affidavit of Franklin M. Fisher, ¶ 12, 13.

advantage for purposes of establishing 'uniqueness.'" *Allen-Myland* 693 F.Supp. at 281; *Will v. Comprehensive Accounting Corp.* 776 F.2d 665 (7th Cir. 1985).[18]

In this case, plaintiffs do not suggest that Chrysler has market power through barriers to entry into the marketplace. Rather, plaintiffs' theory on uniqueness is that Chrysler has market power through its unique and well-known trademark. The fact that Chrysler's vehicles bear a "unique" trademark does not raise an issue of fact as to market power. Although, at one time, some courts viewed the existence of a trademark as sufficient for market power, *see, e.g. Warriner Hermetics v. Copeland Refrigeration Corp.*, 463 F.2d 1002 (5th Cir.), *cert. denied*, 409 U.S. 1086, 93 S.Ct. 688, 34 L.Ed.2d 673 (1972), no cases since *Jefferson Parish* have held that a trademark alone establishes market power. *See, e.g., Mozart Co. v. Mercedes-Benz of North America, Inc.* 833 F.2d 1342, 1346 (9th Cir.1987); *Will v. Comprehensive Accounting Corp.* 776 F.2d 665, 673 n. 4 (7th Cir.1985), *cert denied*, 475 U.S. 1129, 106 S.Ct. 1659, 90 L.Ed.2d 201 (1986). Accordingly, the Court finds that Chrysler's trademark does not raise an issue of fact as to Chrysler's market power.

For all the foregoing reasons, the Court finds that Chrysler does not have market power in the tying product market. Accordingly, plaintiffs are unable to sustain their *per se* tying claim.

B. *Rule of Reason*

To establish a tying violation under the "rule of reason", plaintiffs—at a minimum—have to demonstrate

[18] "The use of barriers to entry as a proxy for market power is familiar in the law of mergers. Unless barriers to entry prevent rivals from entering the market at the same cost of production, even a very large market share does not establish market power." (citations omitted) *Will v. Comprehensive Accounting Corp.*, 776 F.2d 665, 672, n. 3 (1985).

that the alleged tying arrangement actually forecloses competition in the market for the tied product or is anti-competitive in the tied product market. *See Jefferson Parish* 466 U.S. at 17-18, 104 S.Ct. at 1560-61; *see also Grappone* 858 F.2d at 799.

1. Market Effect in the Tied Product Market

The first question before the Court is to define the tied product market. In defining this market, the Court will rely on the same principles of market definition adhered to by the Court in defining the tying product market. Chrysler argues that the tied product market is all sound equipment sold in the United States for installation in automobiles. Chrysler's uncontroverted facts on that issue may be summarized as follows:

Many of the automobile manufacturers—*e.g.* Chrysler, General Motors, and Ford—manufacture sound equipment for installation in automobiles. Furthermore, many independent firms—*e.g.* Sony, Pioneer, Kenwood, Audiovox—also manufacture sound equipment for automobiles.[19] Chrysler's automotive sound equipment is not unique. Most of the manufacturers of automotive sound equipment produce systems that are *capable* of use in Chrysler vehicles and the vehicles of every other automobile manufacturer. Thus, systems designed by Chrysler for installation in Chrysler vehicles compete—either actually or *potentially*—against the systems manufactured by other automotive sound equipment manufacturers for installation in other vehicles. *See SmithKline* 575 F.2d at 1063 (product market defined to include all relevant sources of supply, including *potential* as well as actual rivals).

Based on the foregoing, the Court defines the tied product market as all sound equipment sold in the United States for installation in automobiles.

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[19] *See* Affidavit of Joseph Clifton Mathis.

In the tied product market—*i.e.* the market for automotive sound equipment—Chrysler's share of the market is limited. There are over 70 distributors of automotive sound equipment in the United States, and most distributors, including Chrysler, have less than a 10 percent share of the automotive sound equipment market.[20] During the time period relevant to this litigation, Chrysler's share of the automotive sound equipment market has ranged from approximately 3 to 7 percent of the market.[21] Chrysler's limited share of the tied product market is such that Chrysler is not in a position to restrain trade or foreclose competition in the market.

Although plaintiffs offer depositions alleging that certain individual distributors of automotive sound equipment have lost sales,[22] these depositions do not demonstrate that Chrysler has either foreclosed competition or restrained trade in the market for automotive sound equipment. Under the antitrust laws, the concern is with maintaining the level of competition in the marketplace, not in ensuring that every individual competitor is protected. *See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488, 97 S.Ct. 690, 697, 50 L.Ed.2d 701 (1977).

In the record before the Court, plaintiffs have not demonstrated an actual restraint of trade in the market for automotive sound equipment. Accordingly, without any evidence of a restraint of trade in the tied product market by Chrysler, plaintiffs are unable to sustain a tying violation under the rule of reason.

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[20] Affidavit of Franklin M. Fisher (*citing* Venture Development Corporation, *Automobile Stereo Equipment III, A Strategic Analysis*, September, 1986).

[21] *Id.*

[22] Dep. Daniel M. McGrath, at p. 101.

2. Market Power over Tying Product for Rule of Reason Violation

Although the majority opinion in *Jefferson Parish* states that a rule of reason violation may be established without the same "degree or kind" of market power that is required for a *per se* violation, *see Jefferson Parish*, 466 U.S. at 19, 104 S.Ct. at 1561, the majority opinion nowhere states or implies that market power over the tying product is not required under the rule of reason.

The requirement of market power over the tying product is consistent with the elements of a tying violation. Market power over the tying product is what makes possible an adverse effect on competition in the tied product market. Unless the seller has market power over the tying product, the seller is not able to restrain competition in the market for the tied product. Both the concurrence in *Jefferson Parish*, and decisions subsequent to *Jefferson Parish*, have held that market power over the tying product is a required element under either the *per se* rule or rule of reason. *See Jefferson Parish* (O'Connor, concurring); *see also Hand v. Central Transport, Inc.*, 779 F.2d 8, 11 (6th Cir. 1985) (market power required under rule-of-reason tying analysis); *see also Hudson's Bay Co. Fur Sales v. American Legend Co-Op*, 651 F.Supp. 819, 841 (D.N.J.1986) (same).

As set forth above, Chrysler does not have market power in the tying product market; in fact, Chrysler faces severe competition in the tying product market from several other automobile manufacturers. Thus, in addition to there being no evidence that Chrysler has restrained trade in the tied product market, there is no evidence that Chrysler has such market power over the tying product that Chrysler can actually restrain trade or foreclose competition in the market for the tied product.

C. *Plaintiffs' Tying Theories*

Plaintiffs seek to redefine the elements of a tying violation, and their submissions are predicated on these theories. Plaintiffs raise the following arguments: (1) market power is not required for a tying claim under Section 3 of the Clayton Act, as distinguished from Section 1 of the Sherman Act; (2) the definition of the market and market power cannot be determined on summary judgment; and (3) Chrysler has market power in a market limited to Chrysler products. The Court rejects plaintiffs' arguments for the reasons set forth below.

1. Requirement of Market Power

Plaintiffs concede that market power over the tying product is an essential element of a tying claim under Section 1 of the Sherman Act.[23] However, plaintiffs contend that such market power is not required for a tying claim under Section 3 of the Clayton Act.[24] The Court disagrees.

Plaintiffs argue that, under Section 3 of the Clayton Act, market power is not required for a tying claim and such a claim only requires proof that the tying arrange-

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[23] Section 1 of the Sherman Act, 15 U.S.C. § 1, provides in relevant part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal. . . ."

[24] Section 3 of the Clayton Act, 15 U.S.C. § 14, provides in relevant part:

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities . . . where the effect of such lease, sale or contract for sale or such condition agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

ment affects a substantial volume of commerce in the market for the tied product. In making this argument, plaintiffs principally rely on the following passage from *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 73 S.Ct. 872, 97 L.Ed. 1277 (1953):

> "When the seller enjoys a monopolistic position in the market for the tying product, or if a substantial volume of commerce in the tied product is restrained, a tying arrangement violates the narrower standards expressed in § 3 of the Clayton Act. . . ." *Times-Picayune* at 608-609, 73 S.Ct. at 880.

Plaintiffs' reliance on *Times-Picayune* is misplaced. First, Section 3 of the Clayton Act was not at issue in *Times-Picayune;* that case was decided under Section 1 of the Sherman Act. Furthermore, cases subsequent to *Times-Picayune* set forth the same tying analysis whether a claim is brought under Section 1 of the Sherman Act or Section 3 of the Clayton Act. *See, e.g., Summerwood Corp v. CADO Systems*, No. 85-0827 at 5, 1986 WL 3768 (E.D.Pa. March 25, 1986) (Pollak, J.) ("[A]lthough tying arrangements can be challenged either under Sherman 1 or Clayton 3, it is now generally agreed that the elements relating to tying violations of either provisions are identical", and market power is a required element under both provisions of the antitrust law). *See Grappone* 858 F.2d at 794; *Mozart Co. v. Mercedes of North America, Inc.*, 833 F.2d 1342, 1352 (9th Cir.1987); *Airweld Inc. v. Airco, Inc.*, 742 F.2d 1184, 1189 n. 2 (9th Cir.1984); *Spartan Grain & Mill Co. v. Ayers*, 581 F.2d 419, 428 (5th Cir.1978), *cert. denied* 444 U.S. 831, 100 S.Ct. 59, 62 L.Ed. 39 (1979); *Tominaga v. Shepherd*, 682 F.Supp. 1489, 1493 (C.D.Cal.1988); *Klo-Zik v. General Motors Corp.* 677 F.Supp. 499, 505 (E.D.Tex. 1987). *See generally*, 4 E. Kintner, *Federal Antitrust Law* § 32.57 at 96-97 (1984).

Based on the foregoing, the Court rejects plaintiffs' argument that Section 3 of the Clayton Act does not require

proof of the seller's market power to sustain a tying claim.

2. Defining the Market

Plaintiffs argue that the determination of the market is a question of fact which cannot be resolved on summary judgment. The Court disagrees.

A court is not required to submit the determination of the market to the jury. On the contrary, a court may define the product market as a matter of law. *See, e.g. Mogul v. General Motors Corp.*, 391 F.Supp. 1305 (E.D. Pa.1975), *aff'd* 527 F.2d 645 (3rd Cir.1976); *Mary Ann Pensiero, Inc. v. Lingle*, No. 86-0144, slip. op. (M.D.Pa. June 5, 1986), *aff'd* 810 F.2d 1163 (3d Cir.1987). *See also Drs. Steuer & Latham, P.A. v. National Medical Enterprises, Inc.*, 672 F.Supp. 1489, 1504 (D.S.C. 1987).

Furthermore, the cases relied on by plaintiffs, *Joe Westbrook, Inc. v. Chrysler Corp.* 419 F.Supp. 824 (N.D. Ga.1976) and *Wm. Cohen & Son v. All American Hero, Inc.*, 693 F.Supp. 201 (D.N.J.1988), are not contrary authority. Although in each case the court chose not to define the market on summary judgment, the decisions were predicated on the evidence before the court and not, as plaintiffs argue, an opposition to a determination of the market on summary judgment.

Plaintiffs also argue that the Court should adopt a relevant market limited to Chrysler's products. Although a one-manufacturer market is possible, this is not such as case. First, plaintiffs' tying claim is not analagous to the so-called "franchise cases" in which courts have adopted a one-manufacturer market. *See, e.g., Metrix Warehouse Inc. v. Daimler-Benz Aktiengesellschaft*, 828 F.2d 1033 (4th Cir. 1987), *cert. denied*, 486 U.S. 1017, 108 S.Ct. 1753, 100 L.Ed.2d 215 (1988); *Mozart Co. v. Mercedes-Benz of North America, Inc.* 833 F.2d 1342 (9th Cir.1987); *Heatransfer Corp. v. Volkswagenwerk, A.G.* 553 F.2d 964 (5th Cir.1977), *cert. denied*, 434 U.S.

1087, 98 S.Ct. 1282, 55 L.Ed.2d 792 (1978). In such cases, courts have adopted a one-manufacturer market because of a substantial investment made by consumers which would become worthless if the consumers did not also purchase the tied product. Typically, these cases involve a franchisor requiring a franchisee to purchase an unwanted product after the franchisee has made a substantial investment in the franchise. Based on the franchisee's investment in the franchise (the tying product), courts have found that there is no "reasonably interchangeability" between the tying product and other products and have limited the market to the tying product.

In this case, Chrysler's customers are not at risk of losing any investment if they decide not to purchase Chrysler's automotive sound equipment (the tied product). Even if the Court assumed some Chrysler customers make a mental commitment to buying a Chrysler (and only later discover that the automotive sound equipment is standard), the mental commitment of the Chrysler customer is not comparable to an investment in a franchise and, as such, does not raise an issue of fact as to a Chrysler-only market.

Plaintiffs' reliance on *Digidyne Corp. v. Data General Corp.* 734 F.2d 1336 (9th Cir.1984), *cert. denied*, 473 U.S. 908, 105 S.Ct. 3534, 87 L.Ed.2d 657 (1985) is similarly misplaced. Plaintiffs rely on *Digidyne* for the proposition that market power may be established for a tying violation without reference to a tying product market. Although the court in *Digidyne* found market power without defining the tying product market, *Digidyne* is not persuasive authority. First, the facts of *Digidyne* are readily distinguishable from this case. In *Digidyne*, the tying product, a computer operating system, was not only copyrighted, but buyers of the system had made investments of millions of dollars which would be useless without the system. This case involves neither a copyright nor an investment.

Furthermore, the statement in *Digidyne* that a defined tying product market is not required to sustain a tying claim has been roundly criticized in subsequent decisions. *See, e.g. Allen-Myland*, 693 F.Supp. at 281, n. 42; *Mozart Co. v. Mercedes-Benz of North America, Inc.* 833 F.2d 1342, 1346, n. 4 (9th Cir.1987); *Will v. Comprehensive Accounting Corp.*, 776 F.2d 665, 6773 n. 4 (7th Cir. 1985); *Tominaga v. Shepherd*, 682 F.Supp. 1489, 1495 (C.D.Cal.1988) (Ninth Circuit in *Mozart* "suggested that the *Digidyne* panel erred in failing to engage in market analysis").

Accordingly, the Court rejects plaintiffs' argument that market power may be inferred in a tying claim without reference to a defined tying product market.

3. Plaintiffs' Submissions

Plaintiffs offer the Court numerous submissions which are predicated on their tying theories. In many instances, plaintiffs contend that their submissions demonstrate that Chrysler has "market power" over Chrysler automobiles without reference to a defined tying product market or the proper definition of market power. Market power is not, as plaintiffs would have it, another term for the preference that *some* buyers have for the products of a particular seller.

In reviewing plaintiffs' submissions, the relevant issue before the Court is whether there is a genuine issue of material fact as to a market limited to Chrysler products or market power by Chrysler in a properly defined tying product market. The Court finds that plaintiffs have not raised a genuine issue of material fact as to market definition or market power.

a. *Consumer Polls*

Plaintiffs submit consumer surveys which, according to plaintiffs, demonstrate that Chrysler sells its automotive sound equipment in a "captive market". The surveys do not support plaintiffs' conclusion. At most, the surveys demonstrate that some Chrysler customers decide to buy

a Chrysler vehicle before considering the type of automotive sound equipment they want.[25] The surveys do not demonstrate that Chrysler's customers commit to buying a Chrysler, even before they discover the options and prices of a Chrysler. The possibility that some Chrysler customers may tentatively select a Chrysler vehicle before focusing on the type of automotive sound equipment does not mean that they are committed to purchasing the Chrysler vehicle, if, when they eventually focus on the automotive sound equipment, they find it unsatisfactory.[26]

Plaintiffs' surveys do not address the relevant considerations of market definition or market power. Accordingly, the Court finds that plaintiffs' surveys do not raise an issue of fact as to a Chrysler-only market or market power by Chrysler in a properly defined tying product market.

b. *Market Research Studies*

Plaintiffs submit market research which compare the buying behaviors of Chrysler's customers to the buying behaviors of customers of other automobile manufacturers.[27] Plaintiffs suggest that these studies demonstrate

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[25] Exhibit B attached to Plaintiffs' Response to Defendant's Reply Memorandum in Support of its Motion for Summary Judgment. One of the survey questions relied on by plaintiffs appears as follows:

> "Q.17 Items you decided you first wanted: First decided on make and model [before] Type of sound equipment: Chrysler 42.3 pecent."

In the best light for plaintiffs, the question may be read as 42.3 percent of Chrysler's consumers decide on a Chrysler vehicle before considering the type of automotive sound equipment they wanted. The survey question addresses the order of purchase, not whether Chrysler customers will buy a Chrysler vehicle, even if the options and price of the options are undesirable.

[26] *Id.*

[27] *See* Exhibits Submitted by Plaintiffs in Opposition to Chrysler's Motion for Summary Judgment; *see, e.g.* Report of Booz, Allen & Hamilton, Inc. (September 19, 1983) (Exhibit B).

Chrysler has a unique control over its customers. However, the studies do not support plaintiffs' conclusory allegations. In fact, the studies submitted by plaintiffs support Chrysler's contention that Chrysler competes against other automobile manufacturers. The studies show that Chrysler's potential customers will freely substitute another automobile make for a Chrysler automobile if a desired type of Chrysler vehicle is not readily available [28] or if they are dissatisfied with Chrysler's options.[29]

Based on the foregoing, the Court finds that the market research studies submitted by plaintiffs do not raise an issue of fact as to a Chrysler-only market or market power by Chrysler in a properly defined tying product market.

c. *Testimony of Chrysler Personnel*

Plaintiffs argue that the testimony of Chrysler personnel support a Chrysler-only market.[30] Plaintiffs contend that Chrysler personnel have stated Chrysler competes in a "market" consisting of Chrysler products. In ordinary speech, the term "market" is used in many different ways. However, the definition of the product market is a term of art. As set forth above, the product market includes all "reasonably interchangeable" products from actual and potential sources of supply. *See, e.g. SmithKline; Allen-Myland.* Accordingly, the testimony of Chrysler's personnel is not relevant to defining a product market.

d. *Affidavit of F. Gerard Adams*

Plaintiffs offer the affidavit of F. Gerard Adams, Professor of Economics at the University of Pennsylvania,

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[28] *Id.* at 192-193.

[29] *Id.* at 362.

[30] *See, e.g.* Dep. of Jack W. Apple, Jr. at 52-54; Dep. of Robert Gonzalez, at 92-94; Dep. of John Mattioli, at 54-55.

as support for their tying claim. Dr. Adams states that Chrysler thas market power in a market limited to the installation of automotive sound equipment in new Chryslers.[31] Although Dr. Adams' statement is correct, it is of no assistance to plaintiffs. It is a given that Chrysler has complete control in a market in which Chrysler is the only seller.

Dr. Adams states that his opinion is predicated on plaintiffs' submissions—*i.e.* the market research studies, consumer surveys, and testimony of Chrysler personnel. Dr. Adams does not offer an independent basis for his opinion. Since the Court has found that none of plaintiffs' submissions raise an issue of fact as to a Chrysler-only market or market power by Chrysler in a properly defined tying product, the Court, likewise, finds that Dr. Adams' affidavit (which is predicated on these same submissions) does not raise an issue of fact as to market definition or market power. *See, e.g., Mid-State Fertilizer Co. v. Exchange National Bank*, 877 F.2d 1333 (7th Cir. 1989) (expert opinion which does not establish an issue of fact does not defeat a motion for summary judgment); *Richardson v. Richardson-Merrell, Inc.*, 857 F.2d 823, 829-832 (D.C.Cir.1988) (expert's declaration, full of assertions but empty of facts and reasons, is insufficient to get a case past a motion for summary judgment).

On a motion for summary judgment, the party seeking to avert summary judgment has to set forth specific facts showing that there is a genuine issue for trial. *See, e.g. Celotex Corp. v. Catrett*, 477 U.S. at 322-323, 106 S.Ct. at 2552-53. For the reasons set forth above, the Court finds that plaintiffs have not raised any genuine issues of material fact in support of their claim of a tying violation by Chrysler Accordingly, the Court will grant Defendant's Motion for Summary Judgment.

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[31] Declaration in Further Opposition to Chrysler's Motion for Summary Judgment (F. Gerard Adams).

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 90-1547

TOWN SOUND AND CUSTOM TOPS, INC., SUBURBAN AUTO SOUND & COMMUNICATIONS, INC., NORTHEAST ELECTRONICS SUPPLY, INC., DOMINION RADIO SUPPLY, INC., on behalf of themselves and all others similarly situated,
Appellants

v.

CHRYSLER MOTORS CORPORATION

Present: SLOVITER, *Chief Judge*, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO and ROTH, *Circuit Judges*

ORDER SUR PETITION FOR REHEARING

A majority of the active judges having voted for rehearing in banc in the above appeal, it is

ORDERED that the Clerk of this Court vacate the panel's opinion and judgment filed August 9, 1991, and list the above case for rehearing in banc at the convenience of the court.

BY THE COURT,

/s/ Edward R. Becker
Circuit Judge

Dated: Sep. 5, 1991

APPENDIX E

STATUTES INVOLVED

§ 1. Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided*, That nothing contained in sections 1 to 7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one

year, or by both said punishments, in the discretion of the court.

July 2, 1980, c. 647, § 1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693; July 7, 1955 c. 281, 69 Stat. 282.

§ 14. Sale, etc., on agreement not to use goods of competitor

It shall be unlawful for any person engaged in commerce in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

Oct. 15, 1914, c. 323, 38 Stat. 731.